Supreme Court, U. S.
FILED
JUN 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-2037

STATE OF MISSOURI,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN ASHCROFT
Attorney General of Missouri

WALTER OTTO THEISS
Assistant Attorney General

ROGER C. BERN
Special Counsel

Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-2632

Attorneys for Petitioner

June, 1980

KELLY PRESS, INC., 201 South Eighth Street, Columbia, Missouri Dial 449-4163

INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 3

Reasons for Granting the Writ

I. The decision of the court of appeals raises important and novel questions of federal constitutional and statutory principles which have not been, but should be settled by this court 10

II. Allowing the erroneous decision of the eighth circuit to stand would threaten the fundamentals of the republican form of government, which is guaranteed to each state by the constitution 11

III. Without analysis, historical or precedential support the eighth circuit announced that a boycott to coerce legislative action by inflicting economic injury upon citizens and businesses within the state constitutes the petitioning of government within the meaning of the first amendment 14

IV. The court of appeals, contrary to the applicable decisions of this court, created a new exclusion from the Sherman Act—trade restraints that are politically motivated 18

Conclusion 22

Appendix A (Opinion and Judgment of Court of Appeals) A-1

Appendix B (Opinion and Order of the District Court) .A-51

Appendix C (United States Constitutional Provisions Involved) A-83

Appendix D (United States Statutes Involved) A-85

Appendix E (Missouri Statutes Involved) A-87

TABLE OF AUTHORITIES

Cases

Page

Buckley v. Valeo, 424 U.S. 1 (1976) 16, 17, 21

CSC v. Letter Carriers, 413 U.S. 548 (1973) 17

Board of Trade v. United States, 246 U.S. 231 (1918) ...19

City of Lafayette, La. v. La. Power & Light Co., 435 U.S. 389 (1978) 21

Cox v. New Hampshire, 312 U.S. 569 (1941) 12

Crown Central Petroleum Corp. v. Waldman, ____ F.Supp. ____, 1980-2 Trade Cas. ¶ 63,327 (M.D. Pa. 1980) 13, 19

Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 20, A-5, A-6, A-19, A-22, A-39, A-74, A-82

Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949) 21, A-47, A-78

Greer v. Spock, 424 U.S. 828 (1976) 17

Hurley v. Hinckley, 304 F. Supp. 704 (1970), aff'd 396 U.S. 277 (1970) 16

Missouri v. N.O.W., No. 79-1379, 1980-1 Trade Cas., ¶ 63,260 (8th Cir. Mar. 28, 1980) 1

Missouri v. N.O.W., 467 F.Supp. 289 (W.D. Mo. 1979) A-2, A-22, A-24

Missouri v. Smith, No. CV 679-26 CC (Circuit Court for Cape Girardeau County, Mo. 1979) 14

Missouri v. Stephans, et al., No. CV 379-330 CC (Circuit Court for Scott County, Mo. 1979) 14

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 19, 21, A-19, A-35, A-40, A-78

Noerr Motor Freight v. Eastern Railroad Presidents Conference, 155 F.Supp. 768 (E.D. Pa. 1957), rev'd 365 U.S. 127 (1961) 21

Parker v. Brown, 317 U.S. 341 (1943) 21, A-19, A-40, A-74

Reynolds v. Sims, 377 U.S. 533 (1964) 11, 12

Thomas v. Collins, 323 U.S. 516 (1945) rehearing denied 323 U.S. 819 (1945) 15

United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974) 16

United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969) 16

United States v. O'Brien, 391 U.S. 367 (1968) 15

Wesberry v. Sanders, 376 U.S. 1 (1964) 11

Constitutional Provisions and Statutes

U.S. Const. Art. IV § 4 .....3, 11, A-83

U.S. Const. art. V 4, A-52

U.S. Const. amend. I 2, A-83

15 U.S.C. § 1 (Sherman Act Section 1) 3, A-2, A-51, A-73, A-85

15 U.S.C. § 26 (Clayton Act Section 16) 3, A-2, A-4, A-40, A-51, A-63, A-69, A-85

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 4

28 U.S.C. § 1337 .....3, A-51

Missouri Antitrust Law, Sections 416.011—416.161, RSMo 1978, pp. 3891-3896 (V.A.M.S., 1979, pp. 461-514):
Specifically:

Section 416.031, RSMo 1978 .3, 9, A-32, A-51, A-87

Section 416.061, RSMo 1978 .....3, 9, A-87

Section 416.141, RSMo 1978 .....3, 9, A-32, A-88

Other Authorities

Restatement (Second) of Torts § 767 (1977) 9, A-32, A-33, A-81

Sullivan, *Handbook of The Law of Antitrust* (1977) 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

STATE OF MISSOURI,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, the State of Missouri, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 28, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, No. 79-1379 (8th Cir. Mar. 28, 1980), is not yet officially reported. The opinion is unofficially reported at 1980-1 Trade Cas. ¶ 63,260. The opinion, together with dissenting opinion by Senior Judge Gibson, is set forth in the Appendix hereto at A-1.

The judgment of the Court of Appeals affirmed the final decision of the United States District Court for the

Western District of Missouri, per Judge Elmo B. Hunter. The District Court's opinion and order, as amended, is reported at 467 F.Supp. 289. The District Court's opinion and order is set forth in the Appendix hereto at A-51. The date of the District Court's order is March 16, 1979, which order amended the District Court's Opinion and Order of February 21, 1979.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 28, 1980. No petition for a rehearing was filed with the Court of Appeals. This petition for certiorari has been filed within ninety days of the judgment of the Court of Appeals for the Eighth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case involves the use of an economic boycott as a purported method of petitioning the government. It raises serious questions concerning what constitutes the First Amendment right to petition government, the permissible governmental limits on methods of petitioning, and the scope of the anti-trust laws. The questions presented are:

1. Does a boycott designed to coerce state legislative action by inflicting economic injury upon citizens and businesses within the state constitute the petitioning of government for a redress of grievances within the meaning of the First Amendment to the United States Constitution?

2. Does a political motive remove an economic boycott from the scope of Section 1 of the Sherman Act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the right to petition government under the First Amendment to the United States Constitution; the republican form of government guaranteed each state by Article IV, Section 4 of the United States Constitution; the scope of the federal antitrust laws, specifically Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 16 of the Clayton Act, 15 U.S.C. § 26; and the Missouri Antitrust Law, specifically Sections 416.031.1, 416.061.1-3, and 416.141, RSMo 1978, pp. 3891-3896 (V.A.M.S., 1979, pp. 461-514).

The verbatim texts of these constitutional and statutory provisions are set out in the Appendices C, D and E hereto.

STATEMENT OF THE CASE

This petition arises from an action for injunctive relief brought by the State of Missouri, petitioner, against the National Organization for Women, Inc. (hereinafter NOW). The action was commenced on February 28, 1978 in the United States District Court for the Western District of Missouri and alleges that NOW is engaging with others in an unreasonable restraint of trade in the nature of a secondary boycott, in violation of: Section 1 of the Sherman Act, 15 U.S.C. § 1, the Missouri Antitrust Law, § 416.031.1, RSMo 1978, and principles of Missouri tort law which prohibit intentional infliction of harm without legal excuse.

Jurisdiction in the district court was based upon 28 U.S.C. § 1337 which confers original jurisdiction upon the district courts over all civil actions arising under any act of Congress regulating or protecting trade and commerce against restraints and monopolies, and upon the principle of pendent jurisdiction over the non-federal claims in-

cluded in the complaint. An appeal to the Court of Appeals for the Eighth Circuit was taken from the final decision of the district court, pursuant to 28 U.S.C. § 1291. Trial of the action commenced in the district court on October 30, 1978 and concluded on November 15, 1978. On February 21, 1979 Judge Hunter entered his Opinion and Order denying Missouri's request for injunctive relief. Following Missouri's Motion for An Order of the Court Amending Findings, Making Additional Findings, and Amending Its Judgment, Judge Hunter entered his Order of March 16, 1979 amending his initial Opinion and Order. It is from the amended Opinion and Order that the appeal to the Court of Appeals for the Eighth Circuit was taken.

In 1972, pursuant to Article V of the United States Constitution, the proposed Equal Rights Amendment (hereinafter ERA) was submitted to the legislatures of the states for their ratification. Article V provides that a proposed amendment to the Constitution shall be valid when ratified by the legislatures of three-fourths of the several states. The initial submission placed a seven year time limit on the ratification process (Tr. Vol. VI, p. 20; Vol. V, p. 25). Within the first six months after the ERA was submitted for ratification, the legislatures of twenty states ratified. Following the initial wave of ratification the process slowed. By the summer of 1977 only thirty-five state legislatures had ratified the amendment, three short of the required three-fourths (Tr. Vol. V, p. 26). Missouri, Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Nevada, North Carolina, Oklahoma, South Carolina, Utah and Virginia had not voted ratification.

As early as 1975 a few organizations which supported ratification of the ERA passed convention boycott resolutions, *i.e.*, they would not hold conventions or meetings in

states that had not ratified the ERA. The National Association of Women Deans, Administrators and Counselors (NAWDAC) was the first organization to pass such a resolution (Tr. Vol. I, p. 155; P.Ex. 1002). In the summer of 1975 NAWDAC advised other organizations, including NOW and American Association of University Women (AAUW) of its action (Tr. Vol. I, p. 165). In May of 1975 the League of Women Voters (LWV) passed its boycott resolution (Tr. Vol. I, pp. 163-164; P.Ex. 830). It was followed in July of 1975 by the National Federation of Business and Professional Women (NFBPW) (Tr. Vol. I, p. 74; P.Ex. 822) and National Education Association (NEA) (Tr. Vol. I, pp. 24-30; P.Ex. 1018). In late 1976, as a result of leadership by NFBPW, an organization known as ERAmerica was formed, and that organization endeavored to promote and coordinate the convention boycott of unratified states (Tr. Vol. I, pp. 179, 183-184; P.Ex. 814 and 819).

Notwithstanding these early activities, little momentum for the boycott had been built, and by February, 1977 only approximately fifteen organizations had adopted convention boycott resolutions (Tr. Vol. I, p. 194; P.Ex. 598). Then NOW entered the scene. In February of 1977 NOW resolved that it would initiate a program of urging other organizations not to hold conventions in unratified states. NOW made the boycott campaign one of its natural projects (Tr. Vol. IIA, pp. 33, 51). As a result of NOW's boycott campaign efforts the number of participating organizations increased dramatically.

Following its February, 1977 decision NOW generated considerable news coverage for its boycott campaign (Tr. Vol. IIA, pp. 42-53). In the summer of 1977 NOW's efforts intensified. Letters were sent by NOW to hundreds of organizations urging those organizations to join the boycott (Tr. Vol. IIA, pp. 63-66). Throughout the summer and

fall of 1977 NOW's boycott campaign continued to gain momentum. Twenty thousand NOW Boycott Campaign brochures were printed and over ten thousand of them were distributed by NOW at the International Women's Year Conference in Houston (Tr. Vol. IIA, pp. 77, 80). The list of boycotters which numbered 28 in July of 1977, numbered 35 by August, 40 by October 1 (Tr. Vol. IIA, pp. 175-176), and 75 by November of 1977 (Tr. Vol. IIA, p. 176; P.Ex. 35). Numerous organizations advised NOW they were joining the boycott.

In the winter of 1977-78 NOW's boycott campaign continued apace. Between 500 and 800 boycott mailings went out to "Dear ERA Supporters" urging them to join the boycott (Tr. Vol. IIA, pp. 151-156). In mailings on January 16, 1978 NOW expanded its effort to obtain additional participation in the boycott by enlisting to a larger extent its local chapters and local members (Tr. Vol. IIA, p. 180; P.Ex. 782). In particular, those local chapters and local members were urged to get city and county boycott resolutions passed, *i.e.*, resolutions prohibiting expense reimbursement for city or county personnel who attended meetings in unratified states (Tr. Vol. IIA, p. 180; P.Ex. 782). On February 1, 1978 NOW opened its phone campaign (Countdown House) to enlist NOW members across the country to pressure organizations to which they belonged to join the boycott (Tr. Vol. IIA, pp. 177-178; Tr. Vol. IIB, pp. 220-221; P.Ex. 46). In filling orders taken by callers working at the Countdown House, NOW sent to NOW chapters more than 15,000 NOW Economic Boycott Campaign brochures and more than 150 Chapter Boycott Kits (Tr. Vol. VIII, pp. 159-160; P.Ex. 392, 393).

In NOW's boycott mailings to others and in the memos, minutes and other internal notes of NOW generated during the period prior to the filing of this action, NOW made

numerous assertions of the economic harm being caused and to be caused to unratified states by the economic pressure of the boycott (Tr. Vol. IIA, p. 71, P.Ex. 8; Tr. Vol. IIA, pp. 166-167, P.Ex. 34; Tr. Vol. IIA, pp. 175-176, P.Ex. 35; Tr. Vol. IIA, pp. 75-77, P.Ex. 48; Tr. Vol. IIB, pp. 245-248, P.Ex. 68; Tr. Vol. IIIA, p. 40, P.Ex. 101; Tr. Vol. IIIB, p. 177, P.Ex. 281; Tr. Vol. IIB, pp. 185-187, P.Ex. 389). NOW evaluated the success of the boycott campaign in terms of the dollar amount of convention business which had been withdrawn or diverted from unratified states (Tr. Vol. III, pp. 162-163; Tr. Vol. V, p. 146; P.Ex. 8). And, as of January, 1978, NOW was estimating that Kansas City and St. Louis had a combined loss of $19 million as a result of the boycott (Tr. Vol. VIII, pp. 155-156, P.Ex. 380).

The chair of NOW's Economic Sanctions Committee acknowledged that "it may be that some people will be hurt," (Tr. Vol. V, p. 150) and that "there will be a short-term harm for a long-term good" (Tr. Vol. IIA, p. 168) as a result of the boycott. In fact she acknowledge that as a matter of definition the boycott is designed to cause economic harm to hotels and restaurants in unratified states in the short term (Tr. Vol. V, p. 150) in order to gain ratification of the ERA by the legislatures of those states.

By February 16, 1978 NOW's boycott list contained over 110 organizations, cities and counties (Tr. Vol. VII, pp. 187-188, P.Ex. 376). After NOW learned that Missouri was contemplating this action it considerably toned down its admissions about the economic harm its boycott was causing. On February 24, 1978, following her meeting with the Missouri Attorney General on this matter, Sandra Roth, an officer of NOW, made a report to the NOW Economic Sanctions Committee which signaled a new rhetoric for the

campaign and also the defense that would be asserted at trial. She stated: "The legal stipulations are to document all work, to emphasize our voluntariness, grass roots nature of the campaign; that we are not involved in product or service boycott, that we intend no punishment or economic harm. . . ." (Tr. Vol. VIII, p. 159, P.Ex. 22) On February 28, 1978, the complaint seeking injunctive relief against violation of the Sherman Act, the Missouri Antitrust Law, and Missouri tort law principles was filed by the State of Missouri naming NOW as defendant.

By October 30, 1978 when the case went to trial, the number of boycotting organizations, cities and counties, had grown to over 350. (Tr. Vol. XIII, p. 40; P.Ex. 278) In his Opinion and Order following trial, District Judge Hunter found the evidence sufficient to justify a finding that NOW had entered into a combination to implement a convention boycott of unratified states. (App. A-61 to 62) However, for the reasons stated in his Opinion and Order, Judge Hunter declined to hold that such combination was a violation of the Sherman Act, the Missouri Antitrust Law, or principles of Missouri tort law. (App. A-72 to 82)

The Judgment of the District Court was affirmed by the Court of Appeals for the Eighth Circuit. (App. A-2) The Court of Appeals held that "using a boycott in a non-competitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act." (App. A-30) In so holding, the Court of Appeals specifically stated that it did not decide the issue of whether the Sherman Act applies to non-commercial and non-economic boycotts, nor did it base its decision on the ground that the boycott was non-commercial and non-economic. (App. A-30 n. 16) Having decided that the Sherman Act did not make NOW's activities the basis for a cause of action, the Court of Appeals also decided that there was no cause of action

under the Missouri Antitrust Law, § 416.031.1, RSMo 1978, based on the provisions of § 416.141, RSMo 1978, which provides:

> Sections 416.011—416.161 [of the Missouri Antitrust Law] shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.

(App. A-32)

Finally, as to Missouri's state common law tort claim of intentional infliction of harm without legal excuse, the Court of Appeals held that "the right to petition is of such importance that it is not an improper interference [with contractual relations] even when exercised by way of a boycott." The Court of Appeals held that:

> [T]he Supreme Court's treatment of its *Noerr* doctrine requires recognition of the constitutional ramifications inherent in prohibiting, or considering as improper, activities such as NOW's boycott. The factors to be considered under section 767 [of the Restatement Second of Torts (1977)] require the recognition of overriding First Amendment freedoms such as the right to petition.

(App. A-37)

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals raises important and novel questions of federal constitutional and statutory principles which have not been, but should be settled by this court.

The Eighth Circuit acknowledged that the specific questions presented by this case have not been decided by the Supreme Court or by any other appellate court. The Court of Appeals adopted the district court's characterization of this case:

> [T]his is a unique case. It is different from any case on the law books anywhere. There simply has never been another one like it.

(App. A-18)

The importance of this case was accurately described by Senior Judge Gibson, in the introduction to his dissent:

> Resolution of the unusual and novel issue of law presented by this case will have far-ranging and important consequences on our free and competitive economy and political values because of the fundamental nature of the rights at stake.

(App. A-38)

The Eighth Circuit is the first appellate court to include, within the First Amendment right *to petition the government,* infliction of economic harm to private businesses and citizens in order to extort governmental action. The court sactioned the use of "economic injury [to third parties] to achieve immediate or future [legislative] action." (App. A-6 n. 4)

Under the guise of "petitioning the government," the Court of Appeals has legitimized economic efforts designed to make the public interest suffer to such an extent that the legislature will enact laws, not with a view to the merits of the laws, but with a view to relieving the public's Suffering). (*See* App. A-25 n. 12)

By its decision, the Eighth Circuit has also created a new exclusion to the Sherman Act, one supported neither by the legislative history of that Act nor by any decision of this Court. Notwithstanding the harm caused by the restraint of trade, the Court of Appeals held that the Sherman Act does not protect interstate trade and commerce from the economic effects of boycotts, the purpose of which is political change through economic injury or stress. The Court of Appeals holds that a political motive transforms an *economic* activity into "political activity" beyond the scope of the Sherman Act, and outside the reach of the government's power to protect the public interest.

II

Allowing the erroneous decision of the Eighth Circuit to stand would threaten the fundamentals of the republican form of government, which is guaranteed to each state by the constitution.

Article IV, Section 4 of the United States Constitution guarantees to every state "a republican form of government." At the heart of the republican form of government is the principle of "one-man, one-vote." *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).[1]

---

[1]Under the "one-man, one-vote" principle each citizen is guaranteed an "equally effective voice in the election of members of his state legislature," the "fountainhead of representative government in this country."

(Continued on next page)

The Court of Appeals decision undermines this principle. It would replace the system of government in which "legislatures . . . are collectively responsive to the popular will," (*Reynolds* v. *Sims,* 377 U.S. at 565) with a system in which the legislature responds to those interest groups able to inflict the greatest economic suffering on the citizenry. In short, the decision substitutes raw economic power for the ballot box.

Though NOW contends that an injunction against its conduct would offend the First Amendment, the truth is that its conduct, a boycott designed to hurt the public interest, is one of those excesses that if unrestrained will threaten the maintenance of public order without which liberty itself, including First Amendment rights, will be lost. *Cox* v. *New Hampshire,* 312 U.S. 569, 575 (1941). Rather than promoting legislation rationally, rather than persuading others of the merits of their case, NOW and those acting in concert with it would engage in an economic slugfest with the blessings of the Court of Appeals. In the words of NOW, "We can convince with economic pressure where we have failed with moral persuasion." (P.Ex. 35)

The Court of Appeals' Opinion validates NOW's position that the United States political system is bankrupt. What NOW would propose in its stead is a system in which all pressing issues of the day are decided by "muscle."

Footnote continued

Reynolds v. *Sims,* 377 U.S. at 564-565. As noted by this Court, 377 U.S. at 573, n. 53:

> [Thomas Jefferson] wrote that 'a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . by representatives chosen by himself . . . .' Letter to Samuel Kercheval, 10 Writings of Thomas Jefferson (Ford ed 1899) 38. And a few years later, in 1819, he stated: 'Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudicies themselves cannot be justified.' Letter to William King, Jefferson Papers, Library of Congress, Vol. 216, p. 38616.

P.Ex. 283) Enactment of a law, or the ratification or non-ratification of a constitutional amendment would be *dictated* by the interest group able to inflict the greatest and most painful economic (and other) harm. According to one of NOW's experts, that "is what American politics seems to me to be all about." (Tr. Vol. XII at 144)

The State of Missouri rejects that proposition as abhorrent to our constitutional system of government. It is imperative that this Court nip such a notion in the bud and make it clear that *rational discourse,* not economic coercion, will be the method by which pressing issues of the day, such as ERA, windfall profits taxes, pro-choice vs. right to life, balanced budget amendments, etc., are to be decided. NOW's conduct is an attempt to replace the American political system with one in which laws are adopted by those unable to bear the harm inflicted upon them by the advocates of a particular policy. The implication for our society is clear, and it is crucial that this Court affirm that "'survival of the fittest" is not a constitutional principle.

The significance of the Eight Circuit's endorsement of economic sanctions as an additional and powerful weapon in the arsenal of various interest groups will not be missed. Within the past three months the district court in *Crown Central Petroleum Corp.* v. *Waldman,* ____ F.Supp. ____, 1980-2 Trade Cas. ¶ 63,327 (M.D. Pa. 1980) has approved as protected First Amendment expression a concerted shutdown of retail gasoline operators who were attempting by that action to "raise and fix prices for the retail sale of gasoline" by causing the Department of Energy to modify existing petroleum price regulations. *Id.,* 1980-2 Trade Cas. at p. 75, 679. The purpose of that shutdown, of course, was to inflict suffering upon the public sufficient that D.O.E.

would be coerced to acquiesce in the conspirators' demands in order to relieve the public's pain.[2]

If the activities in *Missouri* v. *NOW* and *Crown Central Petroleum* v. *Waldman* are elevated to protected status as "petitioning" under the First Amendment, society will be just as powerless to prevent future restraints which differ only in magnitude.

III

Without analysis, historical or precedential support the Eighth Circuit announced that a boycott to coerce legislative action by inflicting economic injury upon citizens and businesses within the state constitutes the petitioning of government within the meaning of the first amendment.

A. Novel Pronouncement

Without analysis the Court of Appeals has enunciated a new principle of constitutional law: an economic boycott *is* the exercise of the right to petition.[3] It cited no authority and made no explanation for this conclusion, nor for its

---

[2]Just as the retail gasoline operators sought to coerce governmental action by their concerted shutdown in *Crown Central*, the independent truckers sought to coerce a change in governmental regulations by their blockades of barge and pipeline petroleum terminals in the summer of 1979. Their blockade was intended to cause fuel shortages injurious to the public such that the federal government would feel compelled to grant relief by acceding to the truckers' demands regardless of the merits of those demands. The State of Missouri acted successfully to enjoin these blockades. *Missouri* v. *Stephans, et al.*, No. CV 379-330 CC (Circuit Court for Scott County, Mo. 1979) (permanent injunction entered July 5, 1979, prohibiting concerted action to impede access to pipeline terminal at Scott City, Missouri); *Missouri* v. *Smith*, et *al.*, No. CV 679-26 CC (Circuit Court for Cape Girardeau County, Mo. 1979) (permanent injunction entered July 5, 1979, prohibiting concerted action to block or otherwise impede access to oil pipeline and barge terminals in Cape Girardeau, Missouri). The Eighth Circuit decision does not permit the state to act in the future to protect the public from such trade restraints.

[3]The court stated (App. A-20): "[A]n infringement upon the people's right to petition the government *by a boycott* should also not be lightly attributed to Congress." (Emphasis added)

The court repeated its assumption at App. A-34 to 35: "The right to petition is of such importance that it is not an improper interference *even when exercised by way of a boycott.*" (Emphasis added)

apparent decision that the boycott method is so crucial to preservation of the right to petition that it is beyond interference, or even consideration as improper. (App. A-37) From all that appears in the opinion, the Court of Appeals apparently began its treatment of the case by *assuming,* as its first premise, the constitutional quality of the boycott conduct, because such conduct had communicative characteristics.[4]

B. *United States* v. *O'Brien* Ignored

Had the Court of Appeals engaged in the analysis mandated by this Court in *United States* v. *O'Brien,* 391 U.S. 367 (1968), it would not have found government powerless to respond to economic restraints imposed by NOW and its co-conspirators in this case. In those cases where the *method* of expression may be split away and considered separately from the *message* expressed, the government may prohibit the *method* without offending the First Amendment. This Court made it clear in *O'Brien,* 391 U.S. at 376, that not every method of expression is beyond governmental regulation:

> We cannot accept the view that an apparently limitless variety of *conduct* can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. (Emphasis supplied)[5]

---

[4]This Court's cases interpreting the permissible limits on speech are appropriately considered in answering similar questions concerning the right to petition government. *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945), rehearing denied 323 U.S. 819 (1945).

[5]O'Brien burned his Selective Service registration certificate on the steps of the South Boston Courthouse, "to influence others to adopt his antiwar beliefs." 391 U.S. at 369-370. He was indicted and tried upon the charge that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate . . . in violation of Title 50, App., United States Code, Section 462(b)." O'Brien asserted that as applied to him the statute under which he was prosecuted was unconstitutional because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument was "that freedom

(Continued on next page)

A communicative element of any particular conduct may be sufficient to bring into play the First Amendment, but it does not automatically follow that the conduct is therefore constitutionally protected. In *O'Brien,* "the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication," *Buckley* v. *Valeo,* 424 U.S. 1, 17 (1976). Here, the Congressional interest in prohibiting trade restraints is wholly unrelated to the use of trade restraints, *e.g.,* economic boycotts, as a means of communication. If ever there were a case like *O'Brien* where the *method* of communication (nonspeech element) can be separated from the communication itself (message), it is this case. Even as the *method* of communication was held subject to prohibition in *O'Brien,* the *method* of communication (boycott) is subject to prohibition in this case. Clearly, communication of support for the Equal Rights Amendment is not dependent upon the boycott *method.*

C. Failure to Balance

Even had the Court of Appeals determined that the nonspeech activity here (boycott) was too closely connected with the communication of support for the Equal Rights Amendment to permit a splitting off and prohibition of the conduct under the *O'Brien* principle, that would not end the matter. This Court has made it clear that First Amendment rights are not absolute:

Footnote continued

of expression which the First Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct [was] within this definition because he did it in 'demonstration against the war and against the draft.'" 391 U.S. at 376. This Court rejected that argument. 391 U.S. at 376-382.

Particularly in the area of influencing governmental officials the law is clear that *not all methods* of influencing are constitutionally protected. *United States* v. *Brewster,* 506 F.2d 62 (D.C. Cir 1974) (bribery); *United States* v. *Eberhardt,* 417 F.2d 1009 (4th Cir. 1969) (*cert.* denied 397 U.S. 909 (1970)) (destruction of public records); *Hurley* v. *Hinckley,* 304 F.Supp. 704 (1970), aff'd 396 U.S. 277 (1970) (trespass).

> The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." Adderley v Florida, 385 U.S. 39, 48, 17 L.Ed.2d 149, 87 S.Ct. 242.

Greer v. *Spock,* 424 U.S. 828 (1976). *See also, CSC* v. *Letter Carriers,* 413 U.S. 548, 567 (1973). Referring to the *Letter Carriers* case in *Buckley* v. *Valeo,* 424 U.S. 1 at 25, (1976), this Court stated:

> Even a " 'significant intereference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.

This Court in *Buckley* v. *Valeo* balanced the governmental interest in limiting campaign contributions against the asserted societal interest in unrestricted campaign contributions and found the governmental interest weightier. Here, the Court of Appeals was also obligated to balance the governmental interests in maintaining a freely competitive economic system in which trade and commerce are protected from boycotts and other undue interferences, against the societal interests in the utilization of such interferences with trade and commerce as a method of petitioning the government.

Because of the absolutist approach the Court of Appeals took toward the right to petition, once it had labeled the boycott an exercise of that right it stopped further consideration of its legality. Judge Gibson in dissent (App. A-42), expressly noted the majority's failure to address the critical balancing, stating:

> [The majority opinion] virtually ignores the anticompetitive and disruptive effect of the adverse economic

impact of NOW's conduct and fails to acknowledge government's legitimate interest in protecting and regulating interstate commerce and in maintaining a competitive economy.

The Court of Appeals' decision, unsupported by history or precedent, opens the notion of petition to an expanded meaning which may include extortion and any other means that might influence governmental decisions.

IV

The Court of Appeals, contrary to the applicable decisions of this court, created a new exclusion from the Sherman Act—trade restraints that are politically motivated.

A. New Exclusion A Threat To Free Enterprise And To Government

Unless the decision of the Court of Appeals is reversed, no business, large or small, can rely upon the national policy of competition as embodied in the Sherman Act to protect it from boycotts or other trade restraints so long as a motive of such restraints is political.

The "political activity" exclusion created by the Court of Appeals means that any segment of our free enterprise system may find itself a hostage in the hands of any number of interest groups. The success of any business will no longer depend on business acumen, skill, hard work, ingenuity, or the quality and price of its product. Rather, business success may hinge on the whim of various interest groups vying to inflict the most harm to the public, in order to coerce enactment of each group's desired legislation. Ironically, business will no longer succeed or fail based on business skill; Congress and the Legislatures will no longer enact laws based on the merits of the laws them-

selves. Our law makers will legislate based on a desire to relieve the public from the injurious effects of unrestrained excesses inflicted on the business sector, and on the public at large. The threat to the economic sector is severe; the threat to the integrity of our political system of government is apparent.

Perhaps an even greater threat to our political system, if the Court of Appeals is not reversed, is that those with great economic power will now find that such power can be directly translated into political power. Simply stated, the suppliers of any important product or service can now combine to withhold the same from the public until their political will on a given matter is enacted as law. *Crown Central Petroleum Corp.* v. *Waldman*, 1980-2 Trade Cas. ¶ 63,327 (M.D. Pa. 1980).

B. "Labelling" Instead Of Analysis

The basic flaw in the Court of Appeals' decision with respect to the Sherman Act and the Missouri Antitrust Law is the conclusion that an *economic* boycott in the purest sense of the term can be converted into something else—"political activity"—by the actors' motive. Such a transformation based on motive is not only unwise, but wholly foreign to antitrust analysis. *Board of Trade* v. *United States*, 246 U.S. 231 (1918); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). It is hornbook law that trade restraints are judged on the basis of their *effects*, not upon the *motives* of the actors. Professor Sullivan aptly noted:

> When competitive processes are or will be stifled by particular conduct, it is small comfort that those engaging in it have other ends in view.

Sullivan, *Handbook of the Law of Antitrust*, 194 (1974).

Judge Gibson, in dissent (App. A-45 to 46), recognized the irrelevance of motive:

> [T]he technical characterization of the boycott as noncommercial and noneconomic is misleading and actually erroneous in important respects. The anticompetitive economic and commercial effects of the boycott on Missouri's legitimate business interests and welfare are identical, regardless of whether the motivation for the boycott is political or economic. The majority thus places the court's imprimatur upon a boycott with potentially severe economic and commercial consequences simply on the basis of the boycott's motivation. The precedential support for drawing this determination is tenuous at best.

In short, labeling is no substitute for analysis.

C. Contrary to *Noerr*

Though the Court of Appeals claims that this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight,* 365 U.S. 127 (1961), supports its new Sherman Act exclusion, nothing could be further from the truth. None of the reasons for failure to apply the Sherman Act in *Noerr* is even present in this case. In fact, *Noerr* is the very antithesis of the *N.O.W.* case. *Noerr* presented a combination to get legislation harmful to others. *N.O.W.* is a combination to harm others to get legislation—two quite different situations.

Further, the Court of Appeals (at App. A-28) expressly rejected this Court's significant caveat in *Noerr* that there were "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers." 365 U.S. at 142. The Eighth Circuit (App. A-26 to 27) instead relied upon some general language of the District

Court in *Noerr Motor Freight* v. *Eastern Railroad,* 155 F.Supp. 768, 778 (E.D. Pa. 1957). That very finding, direct interference, that was *not made* in *Noerr, was made* by the District Court and *confirmed* by the Court of Appeals in this case. The critical facts which kept the defendants in *Noerr* within the protected "category of those that involve restraints *through governmental action* [as contrasted with restraints resulting from private action]," (emphasis supplied) 365 U.S. at 142, are missing in this case. On the contrary, the facts in this case show NOW's actions put it within the category involving restraints through *private,* not *governmental* action.

D. Contrary to *City of Lafayette*

Finally, the creation of this new exclusion to the Sherman Act is contrary to the policy against implied exclusions which this Court has recently expressed in *City of Lafayette, La.* v. *La. Power & Light Co.,* 435 U.S. 389 (1978). In essence the Court of Appeals concluded that the availability of an economic boycott to coerce legislative action was weightier than the national policy of competition. It is submitted that this is an erroneous conclusion. Such economic extortion is certainly not on a par with lobbying activities (*Noerr*) or the fundamentals of federalism (*Parker* v. *Brown,* 317 U.S. 341 (1943)), the only two countervailing policies thus far found to be weightier than the national policy of competition.

It is clear that the failure of the Court of Appeals to recognize either the *O'Brien* principle (that communication by conduct can contain severable lawful and unlawful elements), or the balancing principle of *Buckley* v. *Valeo,* contributed to its creation of this new antitrust exclusion. For such failure caused it to ignore this Court's teaching in *Giboney* v. *Empire Storage and Ice Co.,* 336 U.S. 490, 502 (1949), and *National Society of Professional Engineers*

v. *United States*, 435 U.S. 679, 697 (1978). Those cases make it clear that mere involvement of First Amendment rights in an unlawful restraint of trade does not shield that restraint from application of the antitrust laws.

CONCLUSION

If the decision below is allowed to stand, the entire free enterprise system is subject to direct interference, manipulation and restraint because politically motivated, but harmful, economic action is considered beyond the scope of the Sherman Act, and beyond the power of governmental regulation or judicial protection. The Sherman Act will be a torn and crumpled "Magna Carta of free enterprise" if it is powerless to prohibit direct and intended harms to the competitive system, based solely on the fact that the motive of those inflicting the harm is ultimately political.

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General of Missouri

WALTER OTTO THEISS
Assistant Attorney General

ROGER C. BERN
Special Counsel

Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-2632

Attorneys for Petitioner

June, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 79-1379

STATE OF MISSOURI, *Appellant,* v. NATIONAL ORGANIZATION FOR WOMEN, INC., *Appellee.*	**Appeal from the United States District Court for the Western District of Missouri**

Submitted: November 7, 1979
Filed: March 28, 1980

Before GIBSON, Chief Judge;* STEPHENSON and HENLEY, Circuit Judges.

STEPHENSON, Circuit Judge.

This case poses serious questions concerning the First Amendment's right of petition and the scope of the antitrust laws. The primary question with which we must deal is the applicability of the Sherman Act to a politically motivated but economically tooled boycott participated in and organized by noncompetitors of those who suffered as a result of the boycott.

---

*The Honorable Floyd R. Gibson was Chief Judge of the Eighth Circuit at the time this case was submitted and took senior status on December 31, 1979, before the opinion was filed.

Essentially, the National Organization for Women, Inc., (NOW) organized a convention boycott against all states that had not ratified the proposed Equal Rights Amendment (ERA).[1] The impact was such that the Missouri motels and restaurants catering to the convention trade, and the Missouri economy as a whole, were suffering revenue losses. Missouri asked for injunctive relief against NOW's activities under section 16 of the Clayton Act, 15 U.S.C. § 26, which the district court[2] denied. The court, in a well-reasoned opinion, found primarily on the basis that NOW's activities were political and thus not within the scope of the Sherman Act, that NOW had not violated section 1 of the Sherman Act, 15 U.S.C. § 1. *Missouri* v. *National Organization for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. 1979).

Because we hold that it was not the intent of Congress that the Sherman Act cover such activities, we affirm the district court.

I. Background

The district court opinion thoroughly sets out the factual circumstances of this case.[3] A skeletal summary of the facts most relevant (borrowing generously from the district court's language is as follows:

(1) "NOW actively engaged in an 'economic boycott campaign' that has been a significant part of and

---

[1]The proposed twenty-seventh amendment to the United States Constitution reads as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

[2]The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri.

[3]The district court's full discussion of the facts is found in *Missouri* v. *National Organization for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. 1979).

shared common goals with a larger convention boycott movement directed at unratified states," *id.* at 293;

(2) The convention boycott takes place in what is essentially a political context;

(3) The goal and sole purpose of NOW's economic boycott campaign is the ratification of the ERA;

(4) The motivation of NOW can be viewed from two points, both aimed directly at the legislative process:

(a) a desire to make a symbolic gesture; and

(b) a desire to attract attention and bring public visibility to the issue of ratification;

(5) NOW also intended that the adverse economic impact of the boycott on those who would otherwise profit from conventions in Missouri would cause those persons to influence their legislators to support ERA ratification;

(6) The boycott and related activities were not intended as punitive for Missouri's past failure to ratify; and

(7) NOW was not motivated by any type of anti-competitive purpose;

(8) The participants are not in a competitive relationship with Missouri—which has suffered as a result of the boycott.

The district court concluded that:

(9) The boycott is noncommercial in that its participants are not business interests and its purpose is not increased profits;

(10) The boycott is "non-economic" as it was not undertaken to advance the economic self-interests of the participants;

(11) Assuming arguendo that the actions taken by NOW fall within the purview of the Sherman Act,

(a) NOW entered into a combination to implement a boycott of unratified states; and

(b) "the invitation to act, the presence of a strong motive for concerted action, and the knowledge that others were taking similar action are sufficient to find conspiracy under the Sherman Act." *Id.* at 296.

Standing for Missouri to bring a cause of action under 15 U.S.C. § 26 was based on the fact that:

(12) "[T]he businesses of Missouri's convention industry have suffered economic injury as a result of the boycott and are threatened with additional injury in the future," *id.* at 300;

(13) "The adverse effect of the injury extends to all parts of the economy of the state," *id.*;

(14) NOW's target is the state legislature, the supreme policy-making body of the state.

The court concluded:

(15) Missouri has standing as *parens patriae* as this is a case in which the state is seeking to protect the public interest.

The court cautioned, in connection with its determination of standing *parens patriae*:

(16) It must be noted that this conclusion is the result of a consideration of the economic and policy factors in this case. This opinion is not to be read as a general approval of *parens patriae* standing as a matter of law in any case in which the state adduces expert testimony to show generalized economic injury due to linkage or interdependence among the various sectors of the state's economy.

Id. at 301.

Further, in a footnote the court stated:

> (17) NOW argues that "[a]cceptance of the state's theory [of economic linkage causing damage to the general economy] would give the state standing to sue in every case where any Missouri business claims injury by reason of any tort, including violations of antitrust laws, or presumably even in ordinary breach of contract cases." * * * The Court shares this concern and notes that the economic interdependence rationale for *parens patriae* standing cannot be viewed in isolation or accepted as the sole justification for state standing. To do so would carry the doctrine of *parens patriae* far beyond its proper bounds.

Id. at 301 n.22.

The court also discussed the case of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The court stated:

> (18) "The 'essential dissimilarity' between the convention boycott directed at the legislatures of unratified states and agreements traditionally held violative of § 1 of the Sherman Act is of a greater magnitude in this case than that in *Noerr*," *id.* at 304;
>
> (19) "The Supreme Court's reasons for nonapplication of the antitrust laws in *Noerr* apply with greater weight to this case, which involves political opponents, not commercial competitors; and political objectives, not market place goals. For these reasons, this Court concludes that the Sherman Act does not apply to the actions of NOW in furtherance of its convention boycott campaign." *Id.* at 305 (footnote omitted).

II. Scope of the Sherman Act

A. *Legislative History*

This court would be remiss if it did not acknowledge at the outset that the specific question this case presents has not been decided by the Supreme Court or, for that matter, by any other appellate court.[4] There is certainly language used by the Court in some of its cases that provides guidance, however, and the applicability of *Noerr* to the situation cannot be denied.

The first question relevant to our inquiry is whether the intent of Congress was that the Sherman Act would

---

[4]*But see Council of Defense* v. *International Magazine Co.*, 267 F. 390 (8th Cir. 1920), wherein a state-created Council of Defense sought to boycott a publishing company because of the pro-German sympathies of Stockholder William Randolph Hearst. In *Council of Defense*, this court found that the Council's actions did violate the Sherman Act. However, it is significant to note that our court held in that case that "[t]he declared and obvious purpose was to destroy complainant's business in New Mexico." *Id.* at 411.

In the immediate case, no such purpose exists—in fact, there was a specific finding by the district court that there was no punitive purpose in NOW's boycott in the sense that it was designed to punish for past conduct. The economic coercion of the boycott was designed to procure affirmative action by the Missouri legislature. In *Council of Defense* there was economic punishment for past actions; in the instant case there is economic injury to achieve immediate or future action.

Further, a more basic distinction is that *Council of Defense* did not involve any issue of the right to petition, a fundamental consideration in the instant case and in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). There can be drawn a distinction between political speech and petitioning of the government. At some point, a line must be drawn; this is not the case in which it is necessary to draw the line.

State v. *Horsemen's Benevolent & Protective Ass'n*, 389 N.Y.S.2d 868 (1976) does consider a very similar issue, although the Sherman Act was not involved. In that case, an association of horse owners engaged in a boycott of horse racing (in order to pressure the state to finance an employee pension plan, the cost of which would otherwise fall on the association's members), causing a cessation of racing at Aqueduct. The state brought an action against the association under the New York State "Little Sherman Antitrust Act" for damages. The court disposed of the issue we find so troublesome in this case with the statement "[t]his was not merely an attempt to influence legislation, see *Eastern R. Conf.* v. *Noerr Motor Freight*, 365 U.S. 127 [1961] * * *." *State* v. *Horsemen's Benevolent & Protective Ass'n, supra*, 389 N.Y.S.2d at 869. We do not find the court's reasoning persuasive.

See also Mark Aero, Inc. v. *Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978).

cover activities such as NOW has undertaken in this case.[5]

The 50th and 51st Congresses were primarily concerned with business trusts and the economic power which those trusts possessed.[6] The trust concept involved the shareholders transferring their shares to a single trustee or board of trustees who would exercise complete control over the management of the trust; the shareholders received trust certificates which entitled them to a share of the profits of the trust. Since the trust did not require state sanction, as did corporations, and since the trusts were not subject to the controls and restrictions that states could impose on corporations, they were more unwieldly than corporations. 1 E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 10 (1978). *See generally id.* at 8-13. Public hostility towards the trusts in the late 1800's was immense and severe. *Id.* at 11; Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. Chi. L. Rev. 221, 235 (1956).

> Because a trust typically controlled the integrated levels of a particular industry, it could often control

---

[5]Examples of political boycotts include the boycott of Florida citrus products which was to protest against the Miami referendum withdrawing protection for gay civil rights, and the refusal by colonists to import British goods in order to communicate the strength of public feeling against the Stamp and Townsend Acts early in our country's history.

One of the more famous political boycotts occurred in Montgomery, Alabama, to protest the racial segregation and discrimination on city buses. There have been consumer boycotts on meat, supermarkets, grapes, iced tea in cans, sugar or soft drinks, slacks, lettuce, textiles, chocolate, Saran Wrap, Mexico, tuna, animal skins and furs, Russian products and Japanese products.

The term boycott was derived from a method of retaliation used against a land agent, Captain Boycott, who paid starvation wages to tenants and then evicted those who protested these wages. Tenants rallied the support of Boycott's servants, herders and drivers, and all agreed to cease relations with the Boycott family. *See* Webster's Third New International Dictionary 264 (1971).

[6]The legislative history of the Sherman Act is comprehensively compiled and edited in 1 E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes (1978). *See* also Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. Chi. L. Rev. 221 (1956). Letwin examines the political mood of the country during the years that Congress discussed and passed the Sherman Act.

> the means or sources of supply and dictate the prices or terms at which commodities would be bought, sold, or transported. Moreover, large concerns often agreed to divide markets and to fix prices, engaged in predatory pricing, and discriminated in favor of certain entities.

1 E. Kintner, *supra* at 11. The kind of remedy that the public desired was a law to destroy the power of the trusts, Letwin, *supra* at 235, and such was the purpose of the Sherman Act. But to limit the purpose to such a general one is misleading.

Clearly, by prohibiting trusts, the Congress sought to achieve the preservation of free and fair competition. *See, e.g.,* 1 Kintner, *supra* at 113-18, *quoting* 21 Cong. Rec. 2456-58 (1890) (remarks of S. Sherman). Unfortunately, an examination of the legislative history does not clearly indicate the answer to the question we have here—whether Congress wanted to protect "free and fair" competition from political or social activities that can have the same effect upon competition as the commercial activities of a trust against a business. *See, i.e.,* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal,* 1970 Duke L.J. 247 (1970); Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics and United States* v. *Bechtel Corp.,* 54 Tex. L. Rev. 1411 (1976); Comment, 30 U. Chi. L. Rev. 171 (1962).[7] Missouri does not direct us to, nor have we discovered, any legislative history that indicates an affirmative intent of Congress to do so. The few comments that we find that have some relevance to the question indicate otherwise.

---

[7]The argument that the Sherman Act should cover, *i.e. all* boycotts regardless of motivation, purpose, ultimate goal, etc., is that without coverage, groups would be able to pool economic power in pursuit of private goals with "no more than self-imposed restraints on harms caused to others. The danger is in the collective possession of power itself * * *." Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal,* 1970 Duke L.J. 247, 260 (1970).

For example, the following exchange took place between Senator Sherman, the sponsor of the Act, and Senator George, a major opponent of the Act.[8]

> Mr. GEORGE. Mr. President, this is a very important subject. The bill undertakes to deal with very great evils which in the last few years have done great injury to the people of the United States. I am in favor of legislation to prevent trusts and combinations, but I want effective legislation—legislation that will crush out these combinations and trusts. * * *.
>
> I have given some thought and some reflection to this matter, and I am extremely anxious that some bill shall receive the assent of this Congress which will put an end forever to the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell.
>
> I have considered with some care the provisions of this bill. I do not believe that the effect of its provisions is accurately understood by members of this body. I propose, therefore, to make an analysis of its provisions to see, if we can, what it means, what evils it undertakes to remedy, and what remedy it provides, and how efficacious this remedy may prove to be.
>
> In the beginning, I desire to call the attention of the Senate to the fact that the provisions of this bill are not confined to trusts, to combinations, to arrangments and agreements made between parties who are engaged in business; or, in other words, taking the

---

[8]Kintner points out in his book that Senator James Z. George (D., Miss.), played a significant role in shaping the Sherman Act. 1 E Kintner, *supra* at 15.

language of the bill in its plan meaning, it refers to and brings within the punitory provisions of the fourth section not only arrangements and agreements between manufacturers, between sellers, between transporters, but it brings within its grasp arrangements made by any persons, though merely for moral and for defensive purposes. The bill provides—

> That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States shall be unlawful.

That would apply to an arrangement, to an agreement, to a combination, not of a business character, but, as I before remarked, to such as is purely moral and defensive. It does not say that all arrangements, contracts, etc., made between persons and corporations engaged in selling, transporting, importing, manufacturing, or producing the articles described in the bill shall be unlawful; but it applies to all persons whether so engaged or not. So if this bill passes as it now stands, the farmers and laborers of this country who are sending up their voices to the Congress of the United States, asking, pleading, imploring us to take action to put down trusts, these farmers and these laborers will find that they themselves in their most innocent and necessary arrangements, made solely for defense purposes against the operations of these trusts, will be brought within the punitory provisions of this bill.

It will strike the Senate probably with some astonishment if it be ascertained that under this bill the arrangements made by the Southern farmers during the last season to prevent the consummation of the

robbery of them by the jute-bagging trust are made highly criminal. Under it the farmers of the South who combine to prevent and defeat that most iniquitous and unjust combination will find that they themselves rather than the jute-bagging trust will be the subjects of severe punishment.

* * * *

Upon the formation of this bagging trust the cotton farmers of the South, many of them in their granges and in their alliances, agreed that they would not purchase jute bagging, and by that agreement to a very large extent the rich rewards anticipated by the men who formed that trust were defeated. These combinations tended to prevent full and free competition in the sale of this article. But if that is not very clear, if Senators think these arrangements of the farmers did not have the effect of preventing this full and free competition, I call their attention to another provision contained in the third section of the bill, which reads in this way:

> If acts shall be done under any such arrangement, contract, agreement, trust, or combination, which have for their purpose, or which shall tend to compel the giving up or sale of any lawful business, the person, partnership, or corporation injury thereby may sue for and recover in any court of the United States of competent jurisdiction the damages sustained thereby.

The very object of this combination of Southern farmers was to break down the trust in jute bagging, to compel the men who had seized and got control of the bagging manufacture of this country to give up their business—to loose their grip upon the business of the farmers. It also very clearly violated the other

provision of the bill to which I have just called attention. The fact that the bill does not restrict these combinations, these agreements, to persons engaged in trade, engaged in transportation, engaged in importation, engaged in selling—the fact that it applies to all arrangements, all agreements, all combinations, by whomsoever made, would bring within its reach all defensive agreements made by farmers for the purpose of enhancing the price of their products. This bill, instead of preventing trusts, would have the effect of crushing out all efforts of the people to rid themselves of their injurious effects. . . .

Mr. SHERMAN. Do I understand my friend from Mississippi to claim that under this bill an agreement made by farmers not to buy cotton-bagging or not to buy anything else is a combination within the meaning of the act?

Mr. GEORGE. Yes, sir; directly within the meaning of the act.

Mr. SHERMAN. That is a very extraordinary proposition. There is nothing in the bill to prevent a refusal by anybody to buy anything. All that it says is that the people producing or selling a particular article shall not make combinations to advance the price of the necessaries of life. However, I simply wished to get the answer of the Senator.

Mr. GEORGE. That is the true construction of this bill which I put on it.

Mr. SHERMAN. I desire to say distinctly that that is not my idea or the idea of any one of the committee.

Mr. GEORGE. I presume it is not.

Mr. SHERMAN. Nor do I believe it is a fair construction of the bill.

Mr. GEORGE. But yet that is the legal meaning and force of the bill; and I will state to the Senate and to the Senator from Ohio that it is directly within the terms of this bill to forbid any number of persons belonging to or joining a temperance society whose object is to compel retailers of intoxicating liquors to give up their business.

Mr. SHERMAN. Where men agree that they will not drink at all, does the Senator think that is a combination in restraint of the trade of liquor-sellers?

Mr. GEORGE. What is it?

Mr. SHERMAN. The Senator, as I understand, now claims that an agreement among several people not to drink whisky or brandy is in restraint of the trade of selling whisky or brandy and is therefore a combination within the meaning of this bill?

Mr. GEORGE. I insist that a society, making an agreement or a combination between citizens of a town anywhere in the Union not to drink, not to use in any way vinous or spirituous liquors, and to persuade others to a similar abstention, does, in the language, of this bill, tend to compel persons engaged in retailing liquor in that community to give up their business, and the doing of that is expressly condemned by the third section of this bill. . . .

Mr. [WILLIAM M.] STEWART [R., Nev.]. If an organization for the purpose of having laws passed creating high license is formed, would not that enhance the value of the things prohibited in this bill?

Mr. GEORGE. I have considered that question. I have thought possibly that the courts might say that

> the right of political organization to bring about political results by legislation was not embraced within the provisions of the bill.

1 Kintner, *supra* at 77-79, *quoting* 20 Cong. Rec. 1458-59 (remarks of S. Sherman, S. George and E. Stewart) (1889).

Another conversation that has as its subject the scope of the bill is as follows:

> Mr. WILSON, of Iowa. I desire to offer an amendment to come in at the end of section 1 of the bill, and as an addition to the proviso contained in that section.
>
> The PRESIDING OFFICER. The Secretary will state the amendment proposed by the Senator from Iowa.
>
> The CHIEF CLERK. It is proposed to add at the end of the second proviso to section 1:
>
> > Nor to any arrangements, agreements, associations, or combinations among persons for the enforcement and execution of the laws of any State enacted in pursuance of its police powers; nor shall this act be held to control or abridge such powers of the States.
>
> The PRESIDING OFFICER. The question is on agreeing to the amendment proposed by the Senator from Iowa. . . .
>
> Mr. EUSTIS. Where does the Senator propose his amendment to come in?
>
> Mr. WILSON, of Iowa. I propose it as an addition to the proviso of section 1, and it is simply for the purpose of avoiding an effect which is likely to flow from the earlier provisions of that section. That section provides as follows:

> That all arrangements, contracts, agreements, trusts, or combinations between two or more persons or corporations, or both, made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or with a view or which tend to prevent full and free competition in articles of growth, production, or manufacture of any State or Territory of the United States with similar articles of the growth, production, or manufacture of any other State or Territory, or in the transportation or sale of like articles, the production of any State or Territory of the United States, into or within any other State or Territory of the United States: and all arrangements, trusts, or combinations between such persons or corporations made with a view or which tend to advance the cost to the consumer of any such articles are hereby declared to be against public policy, unlawful, and void.

I will state frankly my purpose in offering the amendment. Under the provisions of this section, should it become a law, every organization in such a State as Iowa, for instance, of the character of the Woman's Christian Temperance Union, the Temperance Alliance, and other organizations intended to promote the execution of the laws of that State in respect of the manufacture and sale of intoxicating liquors would become illegal bodies and their movements subject to the terms and provisions of this bill. I know that was not intended, and yet the language, without being stripped of its power by the amendment I propose, would include all organizations of that kind. All I ask is that the subjects within the police power of the States as embraced within that legislation, of Iowa and any other State

which may desire similar legislation, shall not be embraced within this provision, but that the States shall be left free in the execution of their police powers. . . .

I will just add to what I have said that the proviso to which I offered this as an amendment excerpts from the operations of this section of the bill arrangements, agreements, or combinations between laborers, made with a view of lessening the number of hours of their labor or of increasing their wages, and it also excepts arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products. I think that the exception which I ask to have made by this amendment is quite as worthy of the support of the Senate as either of these.

Mr. HOAR. Allow me to ask the Senator if his amendment accomplishes his object. I understand his object is to protect combinations of persons intended to discourage the use and manufacture of intoxicating liquors.

Mr. WILSON, of Iowa. My object is to exclude them from the operation of the bill.

Mr. HOAR. I understand, to protect them from being affected by it. But the only description in his amendment is of such associations as are in aid of the execution of the laws of a State in pursuance of its police power. Now, if this bill without his amendment would render the class of persons he has described subject to the penal provision, all temperance societies whose object is to persuade mankind not to use intoxicating liquors would still remain in spite of his amendment within the purview of the bill. It seems to me he

should extend his amendment a little further, because, as far as my State goes, this class of associations which he has described do not confine their efforts to the execution of the law, but their efforts are a great deal more extensive and extend to discouraging the use or manufacture of intoxicating liquors altogether. This is what he means, and we would all vote for it.

Mr. WILSON, of Iowa. I am satisfied that my amendment will cover the purpose I have in view concerning my State. If other Senators desire something further in regard to their States, they can move it.

Mr. HOAR. I move to amend the Senator's amendment by adding to it:

> Or to discourage the use or manufacture of intoxicating liquors.

And we will take a vote on that. . . .

The PRESIDING OFFICER. The question is on agreeing to the amendment to the amendment.

Mr. SHERMAN. The Senator from Iowa showed me his amendment. As these organizations in Iowa are associated and organized something in the nature of a corporation, there might be some reason for believing that they possibly might fall within the meaning of the clauses of the bill. Therefore, I have no objection to his amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce; but under the peculiar circumstances, upon the facts stated by the Senator from Iowa, I think it is very proper to make an exception of those organiza-

> tions in Iowa which are really in aid of the execution of State law. I would apply it to all organizations which are using either moral or any other kind of means for the enforcement of local laws; but I do not think it is worth while to adopt the amendment of the Senator from Massachusetts, because that would include temperance societies. You might as well include churches and Sunday schools.

Id. at 250-52, *quoting* 21 Cong. Rec. 2658-59 (1890).

As the exchanges reveal, the conversation provides an *indication*—we do not set it out to show an affirmative statement of intent. Yet, the indication is that it was the competitors in commerce that Senator Sherman had in mind as the concern of his bill, not noncompetitors motivated socially or politically in connection with legislation.

We conclude that the legislative history of the Sherman Act does not reveal that Congress intended to prohibit, with the Sherman Act, activities such as NOW's boycott; this is not inconsistent with the Supreme Court cases considering similar questions.

B. *Case Law*

As the district court in this case stated from the bench, "this is a unique case. It is different from any case in the law books anywhere. There simply has never been another one like it." Consequently, and as we noted earlier, the question of whether NOW's specific sort of activities—an economic boycott, politically motivated, to achieve a legislative goal—was intended by Congress to be within the scope of the Sherman Act, has not been specifically addressed by the Supreme Court. We can, however, find guidance in several of the Court's opinions by noting a complete lack of an affirmative indication that such activities are covered, by taking cognizance of the Court's

passing references that indicate that the activities that were meant to be covered are competitive activities by competitors with some self-enhancement motivation,[9] and by a thorough analysis of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

One of the early, but still timely, Supreme Court discussions of the legislative history of the Sherman Act is found in *Parker* v. *Brown*, 317 U.S. 341 (1943) wherein the Court ruled that the scope of the Sherman Act did not extend to state action.

In the course of its discussion, the Court draws conclusions "not from the literal meaning of the words" of the Act, but from "the purpose, the subject matter, the context and the legislative history of the statute." *Id.* at 351. As the Court noted in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687 (1978), the Sherman Act cannot mean what it says. It was the legislative history upon which the *Parker* Court relied—the

---

[9]For example, note the Supreme Court's language in *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941). In reference to a discussion of whether or not the challenged practice (a boycott) was reasonable, necessary and beneficial, the Court stated:

> As we have pointed out, however, the aim of petitioners' combination was the *intentional destruction of one type of manufacture and sale which competed with Guild members.* The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice *upon a rival method of competition*, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts.

Id. at 467-68 (emphasis added). The Court's language indicates that the Court conducted its analysis assuming that the category of acts which the Sherman Act condemned were those within the competitive business economy of the United States.

We do not mean to overemphasize any reliance upon this type of implicit reference to competitors' practices made by the Court; indeed, we fully recognize that there are probably just as many statements that do not contain such qualifying language. For example, there are comprehensive statements such as follows:

> Section 1 of that Act makes illegal *every* contract, combination or conspiracy in restraint of trade or commerce among the several states; § 2 makes illegal *every* combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce.

Id. at 465 (emphasis added).

fact that "[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history"—in making its determination that the California raisin pro-rate program was not within the scope of the Sherman Act. *Parker* v. *Brown, supra,* 317 U.S. at 351. Of particular importance to the Court's discussion was the fact that an unexpressed congressional purpose to nullify or restrain a state's control over its officers and agents should not be lightly attributed to Congress via the Sherman Act.

In the instant case, an infringement upon the people's right to petition the government by a boycott should also not be lightly attributed to Congress. We perceive a more accurate phrasing of Congress' concern to be not the elimination of boycotts, but elimination of boycotts used by a competitor against a competitor (or against a supplier, customer, etc.) in the business of competing. For example, in the legislative history to which the Court makes reference in *Parker* v. *Brown, supra,* 317 U.S. at 351, 21 Cong. Rec. 2562 (1890), Senator Sherman states that the Act is meant to apply to "business combinations," not to "voluntary associations."

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), one of the primary boycott cases considered by the Supreme Court, the Court held that the Sherman Act was meant to cover what the district court had found to be a "purely private quarrel." In the course of its explanation, the Court discusses the boycott in terms of a business activity amongst competitors. *Id.* at 210-13. The Court also criticises the court of appeals for its heavy reliance on *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 (1940) and in considering the lack of significant effect on the market as relevant in not finding a violation. While noting that there is some strong language in *Apex* that indicates section one Sherman Act violations must include an effect on market prices, the Court emphasizes that

the defendant in *Apex* was a labor union and that part of the basis for the *Apex* decision was a recognition that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra,* 359 U.S. at 213 n.7. While the statement was not necessary to the outcome of the case, the Court's decision in *Klor's* includes a signal that the focus of the Sherman Act is upon commercial-business activities, and that the organization and objectives involved can make a difference in the application of the Act.

Thus, at a minimum, in *Parker,* the Court tells us that the Sherman Act does not mean exactly what it says, i.e., "all combinations in restraint of trade," and that the Act must be interpreted with the setting in which it was enacted; in *Klor's* even when considering the impact of a boycott, the Court does not use overly broad language in holding that the Sherman Act covers such activity. Instead, the Court focuses upon the business nature of the boycott, the intent of the Act to cover "business combinations with commerce objectives," and concludes that the boycott is within the scope of the Act.[10]

Other cases considered by the Supreme Court help define the scope of the Sherman Act, and in a passive manner, limit the Act to apply to commercial activities, as opposed to social or political activities. *See, e.g., Apex Hosiery Co.* v. *Leader, supra* (narrowing the scope of the

---

[10]The Court states that boycotts have long been forbidden and cites *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951)—"such agreements * * * cripple the freedom of traders"—in emphasizing the disfavor with which the courts have viewed boycotts. Additionally, *Klor's* has been interpreted as standing for the proposition that boycotts are illegal per se. Handler, *Recent Developments in Antitrust Law: 1958-1959,* 59 Colum. L. Rev. 840, 862 (1959). However, even in the portion of its opinion in *Klor's* where the Court addresses the crippling effects of boycotts, the Court focuses upon "[g]roup boycotts, or concerted *refusals by traders to deal with other traders* * * *." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra,* 359 U.S. at 212 (emphasis added).

Act in regard to union activities) and *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533, 553 (1944) (the Act does apply to insurance companies—"every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.")

The first Supreme Court case, however, that actively deals with the type of conflict we have in the present case, is *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra.* Although the factual situation in *Noerr* differs from that of this case,—sufficiently that we must specifically address those distinctions—the overriding policy implications of *Noerr* are persuasive.

In *Noerr,* the defendant railroads had engaged in a publicity campaign with the purpose of fostering the adoption and retention of laws that would be destructive of the trucking business.

Basically, the Supreme Court held that the railroads' campaign to get the legislature to pass laws, no matter how unethical that campaign was, was not within the scope of the Sherman Act. The Court said, *inter alia,* "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135. Even this strict ruling sheds some light on the instant case inasmuch as NOW's boycott was stipulated to be an attempt to influence ratification by the Missouri legislature of the proposed ERA. *State of Missouri* v. *National Organization for Women, Inc., supra,* 467 F. Supp. at 293.

It also demands that we deal with the first factual distinction between *Noerr* and our case, and that is the subject matter of the legislation. The legislation in *Noerr* directly concerned the alleged violators of the Sherman Act and the target of the alleged violation, the railroads and the truckers. The parties were intimately affected by and concerned with the legislation as the legislation

would either directly hurt or help them "financially," "economically," and "commercially."

The ERA is not a "financial," "economic," or "commercial" piece of legislation. It is a social or political piece of legislation. While it is obviously perceived by the members of NOW as beneficial, the record indicates, and it seems apparent, that the orientation of both parties, NOW and Missouri, to the ERA is not one of profit motivation. The only financial, economic or commercial matter involved here is Missouri's concern about the financial repercussion of the boycott.

Keeping in mind that what we are discussing is the applicability of the Sherman Act to the facts, and the intent of the Congress to cover such situations, the difference in the content of the legislation—if anything—makes it more clear that NOW's efforts to influence the legislature's action on the ERA are beyond the scope and intent of the Sherman Act. A social piece of legislation and the efforts involved in influencing the legislature's actions on such legislation is further afield from the central focus of the Sherman Act than a commercial piece of legislation[11] and the petitioning efforts associated therewith.

Thus, considered in isolation, the subject matter of the ERA is not helpful to Missouri's arguments. Missouri, however, argues the relevancy of the distinction in connection with its "secondary boycott" theory.

Missouri refers to NOW's activities as a secondary boycott and argues that the district court, in not specifically finding that there was a secondary boycott, erred in its factual findings. Missouri argues that the error taints the district court's other findings and its analysis of the legal

---

[11] *Parker* v. *Brown*, *supra*, of course, deals with the content of legislation by its state action exemption.

issues. The only clue as to exactly how this taint distorts the district court's findings is Missouri's claim that it affected the court's statement that if this "were not a *legitimate* effort to influence the legislature, this Court would be presented with a different case." *Missouri* v. *National Organization for Women, Inc., supra,* 467 F. Supp. at 306 (emphasis added by Missouri in its brief). Missouri appears to equate legitimate efforts to influence a legislature with ethical or non-harmful efforts to influence the legislature.

The Supreme Court establishes the fallacy of this equation in *Noerr*. In its discussion of the railroad's publicity campaign used to influence the legislature which, besides being unethical and harmful, was characterized as deceptive and vicious, the Court noted that the campaign was intended to and did injure the truckers in their relationship with their customers. But

> [i]nsofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 140-41 (footnote omitted). The boycott in this case had a commercial impact and has been called unethical. But—it is political activity aimed at persuading the legislature to take action.[12]

Missouri also claims that the existence of the boycott takes this case out of the scope of *Noerr,* in that the boycott does not fit within *Noerr's* controlling principle—that Sherman Act violations cannot be predicated upon "mere attempts" to influence the passage of Laws. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 135. The boycott, Missouri argues, makes NOW's activities more than a "mere attempt."[13]

Assuming this to be accurate, one need not go further than the *Noerr* case to determine what controls when there

---

[12]Further, the factual setting which Missouri depicts as the background to its "secondary boycott theory" ignores the posture of the case. Missouri paints the picture thus: NOW is withholding all convention business from the Holiday-Johnson Motel (HJM) until HJM goes to its legislator and convinces its legislator to vote for the ratification of the proposed ERA. This characterization of the facts portrays HJM as the target of NOW's boycott. The target of the boycott was not HJM; it was the State of Missouri. It was the State of Missouri which suffered financial loss and which had standing to sue, not "to prosecute purely personal claims of its citizens, * * * but * * * to protect the public interest." *Missouri* v. *NOW, supra,* 467 F. Supp. at 301, *quoting Kelley* v. *Carr,* 442 F. Supp. 346, 357 (W.D. Mich. 1977). Further, the facts clearly reveal, and the district court so found, that there were no punitive intentions involved in the boycott insofar as punishment for Missouri's past failure to ratify the ERA was concerned.

We find Missouri's focus on the facts of this case—and not the district court's—misleading. The district court's view is more appropriate for the issues at hand. NOW's boycott was directed against states that had yet to ratify the proposed ERA. NOW was aware that such a boycott would work against the public's economic interests; NOW was hopeful that the public's interest would suffer to the extent that the public would be persuaded that ratification of the ERA was "desirable;" NOW wanted the public to influence the legislature to ratify the ERA; NOW operated on the presumption that legislators act with regard for the public interest. This is not distinguishable analytically from *Noerr.*

[13]In essence, Missouri tries to limit *Noerr* to a case where a combination uses publicity to get a law passed that would harm the truckers. *Noerr* is more than a *Parker* v. *Brown, supra,* state action exemption case. The Court in *Noerr* discusses the publicity campaign apart from the substantive effect of the legislation.

is more than a mere attempt. The *Noerr* Court initially discusses the three considerations which lead to the Court's conclusion that activities which are comprised of mere solicitation of governmental action with respect to the passage of laws are not violative of the Sherman Act. Those are (1) the essential dissimilarity between an agreement to jointly seek legislation and the agreements traditionally condemned by the Sherman Act; (2) that such a holding would have the effect of recognizing that the government has the power to act in a representative capacity in refusing the people the right to freely inform the government of their wishes; and (3) generally, but "of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions." *Id.* at 137-38.

But the Court then went on to consider, as a separate issue, whether the publicity campaign and the techniques used, including the much-discussed "third-party technique," would take the railroad's actions out of the controlling principle discussed in regard to the mere solicitation of the legislature.

Enlightening as to what this so-called third-party technique is is the *Noerr* district court's discussion of it:

> One of the objectives was the enactment of legislation, *not under the sponsorship of the railroads but by others acting on their behalf,* by what was called in inoffensive and pleasing language, "The third-party technique."
>
> * * * It was also determined that the campaign should be handled through an independent public relations firm. A number of public relations firms were interviewed and of the four or five selected for interview, all were leaders in that particular field. It may be noted in passing that of those interviewed and

> who submitted proposals, about which proposals testimony was given at the trial, each and every one of the suggested programs provided for a campaign of publicity to put the truckers in a bad light with the public; to encourage normal public resentment of the motoring public to the operation of big trucks on the highways; to secure the assistance of organizations which were apparently "independent and public spirited" in the campaign against the truckers, and *to create a demand for legislation penalizing the truckers either by limitation of size and weight or the imposition of user taxes which would make their operation unprofitable.*

Noerr Motor Freight, Inc. v. *Eastern Railroad Presidents Conference*, 155 F. Supp. 768, 778 (E.D. Pa. 1957) (emphasis added).

The organization selected by the railroad to handle the campaign was the Byoir Firm:

> The understanding of the Byoir organization as to its duties in connection with the campaign [was] entitled "The Objectives".
>
> *While the ultimate objective is shrewdly set forth as legislation affecting the truckers, the intermediate goals are also set forth, all designed and aimed at injury to the truckers.* These objectives, including the crystallization of motorist resentment arising from commercial heavy truck operations over the roads, were designed to arouse the public generally of the need to obtain new methods of financing public highways and by methods which would not appear to emanate from railroad sources.

Id. at 778-79 (emphasis added).

Thus, an additional factor in *Noerr*—that which was

more than mere solicitation—was the railroads' third-party technique; further, part of the public relations firm's job was to "create a demand for legislation" by creating public resentment of the trucks. Finally, similar to NOW's goals, the railroad had an ultimate objective—the legislation—and an intermediate goal—injury to the truckers. In the NOW case, the ultimate objective is legislation, and the intermediate goal is inflicting economic injury with the hope of achieving that ultimate objective.

In direct response to the use of the third-party technique, the *Noerr* Court emphasized that the Sherman Act condemns trade restraints and not political activity. The Supreme Court discussed the "publicity campaign" (pseudonym for the third-party technique and the intermediate goal of inflicting injury) as falling clearly within the category of political activity.[14]

The "additional factors" that took the railroad in *Noerr* beyond mere solicitation did not include a boycott. And the Court in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra,* very pointedly made clear that boycotts are destructive, very possibly more destructive than the third-party technique. Yet, at the bottom line, the *Noerr* "additional factors" and the additional factors in this case cannot be analytically distinguished insofar as it is relevant to the applicability of the Sherman Act.

Admittedly, the *Noerr* Court noted that there were no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Here, NOW did attempt and did succeed in persuading others who were "customers" of the State of Missouri not to deal with Missouri. However, the crux of the issue is that NOW was politically motivated to use a boycott to influence ratification of the ERA. In our case, as in *Noerr,*

---

[14] *See* text accompanying note 12, *supra.*

the publicity campaign was not a mere sham to cover up an attempt to interfere with the business relationship of a competitor. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 144.

Further, notwithstanding the superficial impact of the *Noerr* Court's statement that the railroads never directly tried to stop customers from dealing with truckers, and the inherent conflict that the boycott in this case creates with that statement, the distinction is that the NOW boycott is a tool, not just a competitive purpose, just as the "publicity campaign/third-party technique" in *Noerr* was a tool. The results of the tools are the same. The facts demonstrate the similarity. In *Noerr,*

> [c]irculars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry.

Id. at 142-43.

Here, NOW's concerted activities and publicity campaign were initiated to show that in not ratifying the ERA, Missouri was denying rights to women, and in order to show displeasure with Missouri and to show support for the ERA, organizations were urged by NOW not to hold their conventions in Missouri. The ultimate goal was to have the ERA ratified and the hope was that by boycotting the state for as long as the ERA remained unratified in that state, it would result in a favorable legislative vote. *State of Missouri* v. *National Organization for Women, Inc., supra,* 467 F. Supp. at 292.

It is true that there were active solicitations by NOW followed by a boycott decision by the recipients of the solicitation. *Id.* at 295. And yet, borrowing from the Supreme Court's language in *Noerr,* the finding by the district court in the instant case that NOW's campaign was intended to and did in fact injure Missouri in its relationship with its convention customers can mean no more than that Missouri sustained a *direct injury* as an incidental effect of NOW's campaign to influence governmental action.

> It is inevitable, whenever at attempt is made to influence legislation by a campaign of publicity,[15] that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. * * * To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 143-44. NOW appears to have utilized its political power to bring about the ratification of the ERA by the State of Missouri. The tool it chose was a boycott, a device economic by nature. However, using a boycott in a noncompetitive political arena for the purpose of influencing legislation is not proscribed by the Sherman Act.[16]

---

[15]It is important to remember that the district court specifically found that the motivation of NOW was to be viewed from two points, both aimed at the legislative process. These two points were (1) the desire of NOW to make a symbolic gesture and (2) the desire of NOW to create publicity, i.e., attract attention and bring public visibility to the issue of ratification. *State of Missouri* v. *National Organization for Women, Inc., supra,* 467 F. Supp. at 295.

[16]The State of Missouri cites *Hennessey* v. *NCAA,* 564 F.2d 1136, 1147-49 (5th Cir. 1977); *Young* v. *Motion Picture Ass'n of America, Inc.,* 299 F.2d 119 (D.C. Cir.), *cert. denied,* 370 U.S. 922 (1962). *AMA* v. *United States,* 130 F.2d 233 (D.C. Cir. 1942), *aff'd,* 317 U.S. 519 (1943); *Tondas* v. *Amateur Hockey Ass'n,* 438 F. Supp. 310 (W.D.N.Y. 1977); *Tropic Film Corp.* v. *Paramount Pictures Corp.,* 319 F. Supp. 1247 (S.D.N.Y. 1970); and *American*

(Continued on next page)

Thus, while we do not pretend that *Noerr* disposes of all the questions in this case, we additionally do not feel that the distinctions discussed above, notably, the use of a boycott and the injury of a noncompetitor (Missouri) by a noncompetitor (NOW), are relevant to the applicability of the Sherman Act.

There resulted a restraint of trade in the *Noerr* case just as has occurred in this case. In *Noerr* it was accomplished by means of a publicity campaign with the ultimate goal of obtaining legislation that commercially or competitively affected the competitor-campaigners and competitor-target. In the instant case, it was accomplished by means of a publicity-boycott campaign with the ultimate goal of obtaining socially or politically-oriented legislation that had no effect upon the campaigners or target, at least in a commercial or business sense. These distinctions are not where our focus should be.

Rather, the focus should be on the overriding consideration in *Noerr*, the legislative intent concerning the scope of the Sherman Act. And *Noerr* deals with this in a strong fashion:

> Inherent in such fights [as occurred in the *Noerr* case], which are commonplace in the halls of legislative

---

Footnote continued

Brands, Inc. v. *National Ass'n of Broadcasters*, 308 F. Supp. 1166 (D.C. Cir. 1969) for the proposition that the Sherman Act applies to noncommercial and non-economic boycotts. We do not decide that issue. The Sherman Act may apply in some situations to noncommercial and non-economic boycotts. However, we do not rest our decision in this case upon the basis that the boycott was noncommercial and non-economic. Our decision is based upon the right to use political activities to petition the government, as was the underlying factor in *Noerr*. None of the cases cited above involved the political right to petition the government, thus it is not necessary in this case to distinquish them.

The same is true of *Council of Defense* v. *International Magazine Co.*, 267 F. 390 (8th Cir. 1920). *See* note 4 *infra*.

Other courts have been more generous and have equated noncommercial activities with a political right to petition the government. *See, i.e., Council for Employment & Economic Energy Use* v. *WHDH Corp.*, 580 F.2d 9 (1st Cir.), *cert. denied*, 440 U.S. 945 (1978). It is not necessary, under the facts of our case, for our ruling to be so broad.

> bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system * * * .

Id. at 144-45.

III. State Claims

Having decided that the Sherman Act does not make NOW's activities the basis of a cause of action for the State of Missouri, we turn to the other two theories under which Missouri claims NOW's activities create a lawsuit.

The first of these, the Missouri antitrust law, Mo. Stat. Ann. § 416.031.1 (Vernon 1979): "Every contract, combination or conspiracy in restraint of trade of commerce in this state is unlawful," can be disposed of with the same rationale with which we have disposed of the Sherman Act claim. Mo. Stat. Ann. § 416.141 (Vernon 1979) provides: "Sections 416.011 to 416.161 shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." Thus we hold that, just as there is no cause of action under section one of the Sherman Act, there is no cause of action under Mo. Stat. Ann. § 416.031.1 (Vernon 1979).

The final theory under which Missouri brings its lawsuit against NOW is a state common law tort claim of intentional infliction of harm without legal excuse.

The Restatement Second of Torts § 766B (1977) provides:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

The factors to be considered in determining whether the interference is improper are listed in the Restatement Second of Torts § 767 (1977):

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> (f) the proximity or remoteness of the actor's conduct to the interference and
>
> (g) the relations between the parties.

We find, as the district court found, that the discussion and analysis of the court in *Sierra Club* v. *Butz,* 349 F. Supp. 934 (N.D. Cal. 1972) is applicable to the instant case.

The facts are distinguishable; *Sierra Club* involved (1) asserting administrative appeals, (2) filing a complaint in federal court seeking injunctive and declaratory relief, and (3) making other complaints and arguments to the United States Forest Service urging action by the governmental agency. Additionally, there was no boycott involved in *Sierra Club*. But, for the same reasons given in our discussion of the distinctions between *Noerr* and the immediate case, we find these distinctions irrelevant. Further, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) establishes the *Noerr* doctrine applicability to petitioning of courts and administrative agencies.

In *Sierra Club,* plaintiff had moved that the defendant's counterclaims be dismissed for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b). The counterclaims contained two counts, both based on state law tort liability for interference with advantageous relationships. The basis of the defense against the counterclaims was the First Amendment provision guaranteeing the right of the people to petition the government for a redress of grievances. The court concluded that

> liability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petitioning is a "sham," and the real purpose is not to obtain governmental action, but to otherwise injure the plaintiff.

Sierra Club v. *Butz, supra,* 349 F. Supp. at 939. In reaching this conclusion, the district court relied upon the *Noerr* Court's reference to the constitutional issue that would be involved were the Sherman Act interpreted to outlaw attempts to influence legislation.

We agree with the *Sierra Club* court and find sufficient support in *Noerr* and the subsequent cases of the

Supreme Court which refer to *Noerr* to support the conclusion that the right to petition is of importance that it is not an improper interference even when exercised by way of a boycott.

Cases citing *Noerr, e.g., First National Bank* v. *Bellotti,* 435 U.S. 765 (1978); *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978); *Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978); *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 614 (1973); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972); *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965); *NAACP* v. *Button,* 371 U.S. 415 (1963); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 707 (1962), do not modify or limit the language of *Noerr* to the extent that the *Noerr* doctrine becomes something else. However, many of the cases do focus on the *Noerr* Court's reliance on the right of petition and the important constitutional questions that would be raised should the Court impute to Congress via the Sherman Act an intent to cover the *Noerr* activities.[17] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 138-39. *But see id.* at 132 n.6.

---

[17]An important exception to this statement is *United Mine Workers of America* v. *Pennington, supra,* 381 U.S. at 669-72. In *"Pennington"* (as in *"Noerr-Pennington* doctrine") the Court's reference to *Noerr* is rather undramatic and rather unenlightening insofar as what general application the Court plans to give *Noerr* in the future. It is surprising however, only to the extent that one expects more out of the *Pennington* of *"Noerr-Pennington;"* the facts of *Pennington,* however, require the Supreme Court only to reiterate that *Noerr* "shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose." Id.* at 670 (emphasis added).

In *Lafayette* v. *Louisiana Power & Light Co., supra,* 435 U.S. at 399-400 n.17, the Supreme Court noted the *Pennington* holding and added: "Cases subsequent to *Pennington* have emphasized the possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the serious threat to First Amendment freedoms that would have been presented."

Other exceptions to this statement are *Cantor* v. *Detroit Edison Co., supra,* and *National Society of Professional Engineers* v. *United States, supra.*

Of those cases that emphasize the *Noerr* Court's reference to the constitutional concerns involved in *Noerr, California Motor Transport Co.* v. *Trucking Unlimited, supra,* was the one that dealt with it in the most expanded manner. In *Motor Transport,* Justice Douglas stated that the *Noerr* decision rested upon two grounds: (1) that there was no basis in the Sherman Act's legislative history by which to impute a purpose to regulate political activity and (2) that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 510, *quoting Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 138. After stating this, the Court then extended the *Noerr* philosophy to the use of the channels and procedures of state and federal agencies and courts on the basis that not to do so would be destructive of the rights of association and of petition. *Id.* at 510. More importantly, in the course of invoking the sham exception to the *Noerr* case, the Court's focus is on the First Amendment rights, *id.* at 510-516; "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' * * * which the legislature has the power to control." *Id.* at 515, *quoting NAACP* v. *Button, supra,* 371 U.S. at 444.[18]

The parties do not even argue that there is a sham in this case; indeed, Missouri specifically argues that even those residents of Missouri who support the ERA must suffer as a result of this boycott. Thus the central point in *California Motor* and the other cases citing *Noerr* is the shift in focus from the *Noerr* holding that the railroads' activities are beyond the intent of Congress, insofar as

---

[18] *See also California Motor Transport Co.* v. *Trucking Unlimited, supra,* 404 U.S. at 517 (Stewart, J., with whom Brennan, J., joins, concurring in the judgment) (*Noerr* explicitly hold that the joint exercise of the constitutional right of petition *is* given immunity from the antitrust laws).

the Sherman Act is concerned, to the *Noerr* statement that there are serious constitutional questions involved also.

The Court continued its mention of the constitutional issue presented in *Noerr and Lafayette* v. *Louisiana Power & Light Co., supra,* 435 U.S. at 399 and in *First National Bank* v. *Bellotti, supra,* 435 U.S. at 792 n.31.

In *Lafayette,* the Court stated that only two policies have been held to be "sufficiently weighty to override the presumption against implied exclusions from coverage of the antitrust laws"—one of which was the *Noerr* doctrine. (The other was the *Parker* state action exemption.) *Lafayette* v. *Louisiana Power & Light Co., supra,* 435 U.S. at 399. "[A] contrary construction [in *Noerr*] would impede the open communication between the polity and its lawmakers which is vital to the functioning of a representative democracy. * * * '[A]nd of at least equal significance,' is the threat to the constitutionally protected right of petition which a contrary construction would entail." *Id., quoting Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra,* 365 U.S. at 137-38. *See also Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra,* 370 U.S. at 707, and *NAACP* v. *Button, supra,* 371 U.S. at 430-31, where the Court specifically emphasizes the *Noerr* Court's reference to the constitutional concerns involved in *Noerr.*

Thus, we feel that the Supreme Court's treatment of its *Noerr* doctrine requires recognition of the constitutional ramifications inherent in prohibiting, or considering as improper, activities such as NOW's boycott. The factors to be considered under section 767 require the recognition of overriding First Amendment freedoms such as the right to petition. We hold that Missouri has no common law tort claim against NOW.

We hold today that the Sherman Act does not cover

NOW's boycott activities on the basis of the legislative history of the Act and of the Supreme Court's consideration of the legislative history. We hold the same reasoning is applicable to Missouri's Antitrust Act. We hold that NOW's boycott activities are privileged on the basis of the First Amendment right to petition and the Supreme Court's recognition of that important right when it collides with commercial effects of trade restraints. We affirm the trial court's findings and conclusions.

GIBSON, Senior Circuit Judge, dissenting.

Resolution of the unusual and novel issue of law presented by this case will have far-ranging and important consequences on our free and competitive economy and political values because of the fundamental nature of the rights at stake. I cannot agree with the majority's analysis of the issues and application of legal principles, and therefore respectfully dissent.

On appeal, the State of Missouri argues that the District Court's conclusion that the Sherman Act does not apply to NOW's boycott should be overruled because the District Court erred in its application of the *Noerr* exclusion and erred in failing to make the requisite first amendment analysis.[1] I find merit in the State's contentions.

[1]The State of Missouri also argues that certain of the District Court's findings of fact are clearly erroneous, and that the court erred in concluding that the boycott was beyond the scope of the Missouri Antitrust Law and in concluding that the boycott was privileged activity, not actionable in tort under Missouri law. Missouri contends that the factual findings regarding the motivation for the boycott are clearly erroneous because they fail to acknowledge the intention to inflict economic harm. In fact, however, the District Court found that "NOW and the other groups also intended that the adverse economic impact of the boycott on those who would otherwise profit from conventions in Missouri would cause those persons to influence their legislators to support ERA ratification." 467 F. Supp. at 295. Missouri apparently intends to argue that the District Court erred in not according this factor greater weight in determining whether Congress intended the boycott to be subject to antitrust regulation. The latter two arguments primarily involve contentions subsumed in other issues raised, in particular whether the District Court made an appropriate first amendment analysis.

The District Court, ostensibly applying the principles of *Eastern Railway Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), concluded that the NOW boycott would fall outside the scope of the Sherman Act. The court observed that since the convention boycott took place in essentially a political context, and could be characterized as "noncommercial" and "noneconomic,"[2] the "essential dissimilarity" between the convention boycott and those agreements traditionally held violative of section 1 of the Sherman Act was greater in this case than in *Noerr*. Thus, the holding in *Noerr* was considered dispositive of the applicability of the Sherman Act to the NOW boycott. I believe that this is an over-broad interpretation of the *Noerr* case and ignores the basic factual difference between *Noerr* and the present situation of an economic boycott. Most significantly, the District Court practically ignored the critical issue in dispute by merely assuming, without any analysis, that NOW's actions were themselves "an exercise of first amendment rights."[3] The majority opinion follows this same course.

As with any exercise of statutory construction, our first duty is to look to the language of the statute itself. *Lewis* v. *United States*, 48 U.S.L.W. 4205, 4207 (U.S. Sup. Ct. Feb. 27, 1980). The comprehensiveness of the Sherman

---

[2]These terms are used in the sense defined by Bird, in *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 249 (footnote omitted):

> A group's purpose will be considered *commercial* if the objective is profit, and the group is composed entirely of businessmen. A group's purpose is *economic* if the objective is the advancement of the group's economic self-interest and is not a commercial purpose as defined above. A group's purpose is *noneconomic* if it has "no substantial content of material self-interest."

Professor Coons initially established this framework in Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW.U.L.REV. 705, 708 (1962).

[3]The District Court states: "[T]he issue in this case * * * is whether NOW's actions, which are themselves an exercise of first amendment rights, constitute a violation of the Sherman Act." 467 F. Supp. 289, 304 (E.D. Mo. 1979) (footnote omitted). Indeed, this formulation of the issue would almost seem rhetorical. Obviously, first amendment protected activities cannot be outlawed by Congress.

Act[4] has been noted frequently. *E.g., City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."); *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944). The Supreme Court, however, has cautioned that to ascertain the Act's full meaning or application to concrete situations, we must resort to examination of "the purpose, the subject matter, the context and the legislative history of the statute," *Parker* v. *Brown*, 317 U.S. 341, 351 (1943), and the Rule of Reason,[5] *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978); *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911).

The Supreme Court has held that there is a presumption against implied exclusion to the antitrust laws. *City of Lafayette* v. *Louisiana Power & Light Co., supra*, 435 U.S. at 399. The court has recognized only two categories of exclusions, the *Parker* v. *Brown* state action exclusion and

---

[4]The Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony * * *.

The State of Missouri brings this action solely for injunctive relief pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26 (1976), which provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by violation of the antitrust laws * * *.

[5]The Rule of Reason has been used to illuminate the true meaning of the first and second sections of the Sherman Act. *Standard Oil Co., supra*, 221 U.S. at 49. It resorts to common-law traditions to define unreasonable restraints of trade and includes all restraints which new times and economic conditions render unreasonable. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). It is important to note that this established test to define the bounds of antitrust regulation focuses solely upon economic injury to the extent that "the inquiry is confined to a consideration of impact on competitive conditions." *National Society of Professional Engineers* v. *United States, supra*, 435 U.S. at 690 (footnote omitted).

the *Noerr* exclusion, and has stated that even where the fundamental policies underlying these exclusions are implicated, antitrust enforcement will not be precluded unless it would severely impinge upon fundamental policies. The Court explained: "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." 435 U.S. at 398 (footnotes omitted). *See also California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 48 U.S.L.W. 4238, 4241 (U.S. Sup. Ct., March 3, 1980). The Court elucidated the fundamental and overarching policies of the antitrust laws by emphasizing the purpose to eradicate "the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender," 435 U.S. at 408 (footnote omitted), and observed that economic choices counselled solely by parochial interests without regard to their anticompetitive effects would introduce a serious chink in the armor of antitrust protection and be at odds with the comprehensive national policy established by Congress to promote free market competition.[6] *Id.*

In *Lafayette*, the Court explained the *Noerr* decision on the basis that a contrary construction would have been a threat to the constitutionally protected right of petition, and would impede the open communication between the polity and its lawmakers which is vital to the functioning of a representative democracy. 435 U.S. at 399. In order

---

[6] *See also United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), stating:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

to show an exclusive from antitrust enforcement, the Court stated that it is necessary to demonstrate "countervailing policies which are sufficiently weighty to overcome the presumption." 435 U.S. at 400.

The majority does not directly address Missouri's arguments on appeal but rather, through a generalized study, seeks to show that the District Court was correct in concluding that the NOW boycott falls outside the scope of the Sherman Act. The majority's analysis, however, inadequately balances the competing interests. An appropriate analysis of the issue in this case requires careful consideration of whether the convention boycott constitutes constitutionally protected activity under the first amendment; otherwise it must fall within the proscriptions of the antitrust laws as an obvious concerted action to restrain trade and inflict economic harm. Both the District Court and the majority appear to have resolved this issue simply on the basis that NOW's motivation in instituting the boycott was to influence ratification by the Missouri Legislature of the proposed Equal Rights Amendment (ERA). This resolution insufficiently addresses the critical balancing necessary because it virtually ignores the anticompetitive and disruptive effect of the adverse economic impact of NOW's conduct and fails to acknowledge government's legitimate interest in protecting and regulating interstate commerce[7] and in maintaining a competitive economy.

The majority apparently acknowledges that a political boycott can have the same effect upon competition as a commercial boycott, and also recognizes that the legislative history of the Sherman Act does not provide an answer to the question of whether Congress intended to protect competition from the adverse effects of politically moti-

[7] *See* U. S. CONST., art. I, § 8, cl. 3.

vated economic restraints. *Ante* at 9. The majority's review of the legislative history merely reveals an absence of any stated affirmative intent to provide coverage. Their review of case law similarly led to a conclusion that there was a lack of an affirmative indication that politically motivated, economic boycotts are covered by the Act.[8] *Ante* at 17. Without greater support, NOW's exclusion defense must surely be rejected in view of the presumption against implied exclusions, *City of Lafayette* v. *Louisiana Power & Light Co., supra,* 435 U.S. at 399, and the comprehensive language of the Act, the literal terms of which clearly encompass NOW's activities.

Thus, the majority returns to *Noerr* for guidance and concludes that because NOW's conduct was motivated by the purpose of influencing the passage of legislation, the conduct implicated the right to petition government for redress of grievances,[9] raising important constitutional questions, and was essentially dissimilar to conduct traditionally condemned by the Sherman Act[10] and that there-

---

[8]In reaching this conclusion, the majority rejected the implication of coverage that can be derived from the numerous references to the comprehensiveness of the statutory language and the emphasis upon protecting against economic injury to victims of restraints of trade and from anti-competitive effects. In *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 at 506-07, the Court noted "[t]hat the objective of the restraint in the boycott cases * * * was thought to be immaterial because the Court viewed the restraint itself * * * to be of a kind regarded as offensive at common law because of its effect in curtaining a free market and it was held to offend against the Sherman Act because it effected and was aimed at suppression of competition * * *." Other cases have focused upon the injury to individual businesses from restraints of trade and extrapolated from this the injury to free enterprise in the market system as a whole. *See Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656, 659 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores Inc.,* 359 U.S. 207, 213 (1959); *Paramount Famous Lasky Corp.* v. *United States,* 282 U.S. 30, 42-43 (1930).

[9]The first amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[10]The District Court premised its conclusion that NOW's activities were more dissimilar to traditional restraints of trade found violative of the Sherman Act than the activities in *Noerr* on the difference between the subject matter of the legislation desired. The railroads sought the passage

(Continued on next page)

fore NOW's conduct falls without the bounds of antitrust regulation. Unfortunately, the majority does not directly address the important constitutional questions raised, finding that their simple emergence suffices to resolve the question of antitrust coverage. Furthermore, the majority deems "superficial" the *Noerr* Court's clear attempt to distinguish the railroads' publicity campaign from the situation of a direct concerted refusal to deal, *Noerr, supra,* 365 U.S. at 136. *Ante* at 28.

While the majority finds that "the crux of the issue is that NOW was politically motivated to use a boycott," *ante* at 28, Missouri contends that the focus must be upon the use of the boycott, *not* its motivation, because the antitrust laws are designed to protect against the anticompetitive effect of restraints of trade inherent in a boycott, regardless of its motivation. Although the majority seeks to dismiss this effect by characterizing it as "incidental" and portraying the context of the boycott as a "noncompetitive political arena," *ante* at 29-30, the congressional intent to preserve and foster free market competition cannot be summarily dismissed or ignored. The arena may not be economically competitive with regard to NOW, and NOW may not have economic interests at stake in this controversy, but the boycott severely affects the competitive posture of Missouri convention interests and the overall economic welfare of Missouri residents. Thus, the technical characterization of the boycott as noncommercial and

---

Footnote continued

of legislation which would have placed their competitors at an economic disadvantage whereas NOW sought the passage of legislation to support a social goal. This type of analysis poses the threat of judicial interference in matters outside the scope of judicial review and was disapproved in *Noerr*. 365 U.S. at 139. The relative merits or character of lobbying goals is irrelevant to judicial consideration of whether the manner of lobbying may be regulated. "The Sherman Act, moreover, is not an invitation to de novo judgments by courts as to the desirability of the goals sought to be achieved by anticompetitive practices." Note, *"Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation,* 74 YALE L.J. 567, 579 (1965).

noneconomic is misleading[11] and actually erroneous in important respects. The anticompetitive economic and commercial effects of the boycott on Missouri's legitimate business interests and welfare are identical, regardless of whether the motivation for the boycott is political or economic. The majority thus places the court's imprimatur upon a boycott with potentially severe economic and commercial consequences simply on the basis of the boycott's motivation. The precedential support for drawing this distinction is tenuous at best.

The majority explicitly states: "[W]e do not rest our decision in this case upon the basis that the boycott was noncommercial and non-economic. Our decision is based upon the right to use political activities to petition the government, as was the underlying factor in *Noerr.*" *Ante* at 30, n.16. The majority holding is thus conceived as supported or commanded by the *Noerr* decision. *Noerr* held that concerted publicity to influence favorable legislative activity harmful in some respects to others was protected by the first amendment and not violative of the antitrust laws. It dealt with the situation of a publicity campaign to influence legislation action; there was no refusal to deal in *Noerr,* nor was any economic boycott involved.

The case at issue is considerably different. As Mis-

---

[11] *See* note 2, *supra*. These motivation classifications do not attempt to delineate the anticompetitive effect of the conduct described by them. They may, however, aid an evaluation of first amendment claims and a determination of whether the interaction of the boycotters is sufficient to find a combination or conspiracy. Great economic injury and interference with free market competition can result from a boycott, regardless of its motivation. *See* Bird, *supra,* note 2, 1970 DUKE L.J. at 261. In a sense, "it would be hard to say that any boycott is purely non-commercial in character. No matter what the ultimate aim of the combination, a boycott generally involves the infliction of some commercial harm upon the person the combination is trying to coerce into changing his ways." Note, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act,* 30 U.CHI.L.REV. 171, 174 (1962). *See also* Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics, and United States* v. *Bechtel Corporation,* 54 TEX. L. REV. 1411 (1976); Note, *supra* note 10, 74 YALE L.J. 567 (1965).

souri succinctly states: "The *Noerr* case was a combination to get legislation harmful to others. The NOW case is a combination to harm others to get legislation * * *." Unlike the infliction of some direct injury in *Noerr*, the direct economic injury to Missouri is not an incidental effect of the tool used to influence government action; the injury itself constitutes the tool used.[12] Unlike the pure publicity campaign of *Noerr*, NOW went beyond providing the public and legislators with information (however reliable), and actively induced and combined with others[13] to boycott a specific, identifiable segment of a highly competitive industry, the convention industry in states that had not ratified the ERA.

These factual distinctions between *Noerr* and the case at bar mandate that the court in this case undertake a more comprehensive balancing of the important govern-

---

[12]In *Noerr*, the Court stated: "Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity." 365 U.S. at 140-41. This statement does not control the disposition of the case before us, but rather leaves open the issue of whether a trade restraint intended as a political communication should be condemned under the Act. The Court's reference to the railroads' use of the third-party technique in *Noerr* does not present an analogous circumstance to NOW's use of a boycott. The third-party technique was challenged only on the basis that it apparently involved unethical business conduct, not because it created a separate economic tool that could be considered a restraint of trade.

[13]We note that nothing in the antitrust laws would prohibit NOW or other organizations from individually resolving to boycott states that have not passed the ERA and then publicizing their resolution. "The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the [victim]." *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, 312 (1923).

The Supreme Court recently confronted this distinction between individual and collective action in *Brown* v. *Glines*, 62 L.Ed.2d 540 (1980). *Brown* involved the first amendment right to petition for redress of grievances even more directly than the case at bar. In reviewing military regulations that unquestionably impinge upon conduct involving first amendment rights (solicitation of signatures on and circulation of petitions to members of Congress), the Court balanced the first amendment interests with the "substantial government interest unrelated to the suppression of free expression" sought to be protected by the regulations (military effectiveness). 62 L.E.2d at 547. Although forwarding individual communications to Congress was not restricted, group petitioning was distinguished and held to warrant special restrictions on free expression as reasonably necessary to promote the substantial government interest.

mental interest in preserving the free enterprise system with the interest of people to use this particular method of influencing legislation.[14] *Noerr* simply does not imply the conclusion that the first amendment immunizes politically motivated boycotts against antitrust attack.[15] This brings us back to the crucial question of whether, upon balancing the first amendment interests of NOW with the substantial and important governmental interests embodied in the antitrust laws, the politically motivated economic boycott falls within the ambit of the antitrust laws or is constitutionally protected by the first amendment.

---

[14]It is difficult to determine where to draw the line in balancing the various interests, and while it is easy to conclude that political action should not immunize from antitrust attack behavior that is "unnecessarily harmful" to competition, devising a standard to implement the appropriate balance and take into account all the necessary factors is difficult. One standard proposed is:

> Behavior is "unnecessarily harmful" to competition when it is excessively dangerous without being indispensable to the political activity. Analysis of whether conduct is indispensable to the political activity depends upon (1) the severity of the danger to competition, (2) the availability of a less dangerous alternative, and (3) the customary political character of the challenged behavior.

Book Review, 11 RUT.-CAM. L.J. 19, 23 n.36 (1979) (citations omitted), restating the standard proposed in 1 AREEDA & TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ ¶ 201-06 (1978). *See also American Communications Assn.* v. *Douds*, 339 U.S. 382, 397 (1950) (no absolutist test in weighing when harmful conduct and substantial interests of society can justify restrictions upon speech).

[15]The Supreme Court has previously encountered cases where first amendment interests must give way to antitrust enforcement. In *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949), the Court confronted a conflict between first amendment rights of peaceful picketers and the state's valid interest in forbidding agreements in restraint of trade. In rejecting the picketers' argument that their activity was protected dissemination of information, with violation of the state anti-trade restraint laws merely incidental, the Court stated: "Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." 336 U.S. at 502. In *National Society of Professional Engineers* v. *United States, supra*, dealing with the curtailment of first amendment rights of expression on competitive bidding held to be violative of the antitrust laws, the Court held that:

> While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding.

435 U.S. at 697.

This formulation of the critical issue involved herein leads the court into the delicate and complicated area of first amendment law concerning communicative conduct.[16] While I can well appreciate the majority's reluctance to attack these sensitive issues, I feel it is necessary to assure consistent evaluation of similar claims[17] and to bring forth all of the factual findings that are relevant to a thorough consideration of each claim. As a single member of the court I hesitate to arrogate to myself the role of endorsing a particular scheme of analysis, but because of the District Court's failure to address the constitutional issue and its failure to accord significant weight to important and substantial governmental interests, I would remand to the District Court with instructions to make further factual findings and apply a balancing analysis to the first amendment issue.

The District Court found as a matter of fact that the activities of NOW would be encompassed within the meaning of the terms "combination or conspiracy" of section 1 of the Sherman Act. 467 F. Supp. at 296. The evidence here conclusively supports this finding, as NOW admittedly in-

---

[16]For a comprehensive scholarly examination of the thorny first amendment issue in this case, see Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 630 (1978).

[17]The majority's attempt to distinguish this case from *Council of Defense* v. *International Magazine Co.*, 267 F. 390 (8th Cir. 1920), *ante* at 6 n.4, and other noncommercial and noneconomic boycott cases, *ante* at 30 n.16, will not aid reaching a principled disposition of antitrust claims. The difficulty in differentiating political speech from petitioning the government will be great and does not seem warranted by the language of the first amendment, *see* Bird, *supra* note 2, at 288 n.161. In both situations the analysis should reckon with the potential economic disruption produced by the manner of using economic weapons as communication. Furthermore, the *Council of Defense* case simply cannot be distinguished on the basis of an intent to inflict punishment for past actions. The Council evidently believed that Hearst had pro-German sympathies which continued and would continue to bias his reporting. In a sense, the Council's ultimate motive could be considered in part a show of support wor war-related legislation. Unfortunately, the majority's decision to address this precedent obliquely rather than directly may leave in confusion the basic issue of when economic tools may be used with impunity in pursuit of social and political goals.

duced and solicited the support of other groups.[18] The court below, however, investigated the extent of economic harm that would flow from this concerted refusal to deal only in relation to the issue of standing. It never undertook to balance the disruptive effect upon free market competition with the asserted first amendment rights, even though the potential economic and competitive injury that can flow from a particular practice is clearly relevant to an evaluation of the importance of the governmental interest in regulating that practice.[19] *See* note 8 *supra*. When the interference with first amendment rights is minimal and the governmental interest in regulation is great, the mere presence of some first amendment interest cannot prevent the federal government from exercising its constitutionally granted power to regulate commerce.

The potential chill factor that arises in situations involving first amendment rights, *see Bates* v. *State Bar*

---

[18]A recurring and complicated antitrust problem is how to determine the existence of an agreement to restrain trade. *See* Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV.L.REV. 655 (1962). The District Court applied the legal test articulated in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226-27 (1939), which permits finding a conspiracy without finding any explicit agreement. This test may not generally be appropriate in the circumstance of a noneconomic boycott because the normal assumptions regarding market power and the need for interdependence do not exist. *See* Bird, *supra* note 2, 1970 DUKE L.J. at 251-52; Kestenbaum, *supra* note 11, 54 TEX.L.REV. at 1428. In the situation of a boycott promoted by a group that does not have an economic or commercial motive, it may be desirable to probe more carefully into the interdependent nature of the concerted action and whether or to what degree coercion, economic or otherwise, as opposed to pure persuasion, is the impetus to the combination. Furthermore, the distinction between acts of concerted refusal to deal and acts of persuasion or inducement may be relevant to a reconciliation of the first amendment and economic interests involved. *See* Note, *supra* note 15, 91 HARV.L.REV. at 687-91.

[19]The difference between a primary and secondary boycott is one method of focusing on the potential extent of economic and anticompetitive injury because secondary boycotts have a more extenuated economic impact that direct refusals to deal. *See* Bird, *supra* note 2, 1970 DUKE L. REV. at 253; Note, *supra* note 11, 30 U.CHI.L.REV. at 178, 181, 190. This distinction has been important in drawing the line between protected and unprotected activity in other noncommercial contexts, *see, e.g., Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 505 (1940), and might be relevant to the balance to be drawn in this situation. The District Court did not determine whether the convention boycott constituted a primary or secondary boycott.

of Arizona, 433 U.S. 350, 380 (1977), heightens the need to engage in a comprehensive and searching evaluation of the issue before us. We are squarely presented with this dispute, *cf. Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291, 304 (5th Cir. 1979), and should accept the duty to provide guidance for those desiring to assert their political, moral, or social principles through the use of concerted economic power.

Because the District Court and the majority fail adequately to address the complex issue of first amendment rights and the government's interest in regulating interstate commerce and promoting free enterprise, I dissent from the majority opinion and would remand to the District Court for an initial determination of the constitutional balancing issue.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

STATE OF MISSOURI, *Plaintiff,* v. NATIONAL ORGANIZATION FOR WOMEN, INC., *Defendant.*	No. 78-4053-CV-C

OPINION AND ORDER

The State of Missouri brings this action for injunctive relief against the National Organization for Women, Inc. (NOW) under § 16 of the Clayton Act, 15 U.S.C. § 26. Missouri alleges that NOW has engaged in a combination and conspiracy in restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Missouri also alleges that NOW's conduct violates the Missouri antitrust statute, § 416.031.1, RSMo, and constitutes the tortious intentional infliction of economic harm without legal justification or excuse. This court has jurisdiction over the federal antitrust claim under 28 U.S.C. § 1337 and pendant jurisdiction over the state law claims.

Missouri is a sovereign state of the United States and brings this action in that capacity and as *parens patriae.* NOW is a nonprofit membership corporation organized

under the laws of the District of Columbia. It has approximately 77,000 members nationwide, half of whom belong to 690 local chapters. These chapters and individual members are organized into a national federation with the stated purpose of bringing women "into full participation in the mainstream of American society."

I. *Factual Findings*

The factual basis for Missouri's Complaint can be supplied by this single stipulation of fact:

> NOW has sought to persuade and urge those organizations that support making equal rights for women a part of the Constitution to refrain from holding conferences, conventions, and meetings in unratified states.

It is necessary, however, to place NOW's activities within the broader series of occurrences leading to the filing of this action and therefore to set out a summary of the substantial record before the Court.

The proposed Equal Rights Amendment to the Constitution (ERA) was passed by both houses of Congress and submitted to the states for ratification on March 23, 1972.[1] The ERA has been ratified by the legislatures of thirty-five states, short of the thirty-eight required for the amendment to become a part of the Constitution.[2] Ratification of the ERA became a hotly-contested issue in many states, and, as is characteristic of the political system in this country, various individuals and organizations undertook

---

[1]H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 523 (1972) provides:
Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Sec. 3. This amendment shall take effect two years after the date of ratification.

[2]U.S. Const. art. V.

lobbying efforts to influence legislators, both in support and in opposition. Such efforts have included giving testimony before legislative committees, personal contacts with legislators, letter writing campaigns, and solicitation of media attention. Many national membership organizations and associations, including NOW, have engaged in such lobbying.

As early as April of 1975, the National Federation of Business and Professional Women (BPW), a large national women's organization, retained a political consultant and consulting firm to advise the group on strategy for its efforts in support of ratification. The advice received was that a move by BPW, in conjunction with other national organizations, to cancel its national convention, scheduled for a state which had not ratified the ERA (Nevada), might be a powerful tool to influence legislators' votes on ratification. Also in April, 1975, the National Association of Women Deans, Administrators and Counselors adopted a resolution not to convene in unratified states. In May, 1975, the League of Women Voters adopted its resolution to urge the national political parties not to hold conventions in unratified states. Both BPW and the National Education Association took action in July, 1975, and resolved not to hold conventions in unratified states. The American Association of University Women passed its resolution in November, 1975. In September, 1976, the American Political Science Association adopted a similar resolution not to convene in unratified states. There is no evidence that any of these groups were contacted or influenced in any way by NOW. Some groups took this action believing that the convention boycott was an original idea. Others were aware that a convention boycott resolution had been adopted by another group or groups at an earlier time. Some groups made no effort to influence others to adopt boycott resolu-

tions, some took active steps to communicate their decisions and to urge similar action by other groups.

The national NOW organization did not become involved with this movement until 1977. In January of that year, Eleanor Smeal, the current president of NOW, was in Nevada taking part in an effort to secure ratification of the ERA in the Nevada legislature. As a part of that effort, the League of Women Voters and the California state NOW organization sponsored an advertisement in the *San Francisco Chronicle,* a newspaper read by Nevada legislators, urging California residents to refrain from traveling to Nevada until that state ratified the ERA. From the reaction of the Nevada Governor and legislators to the advertisement, it was determined that the potential of such a boycott as long as a state remained unratified could have an effect on legislators' votes.

The then-president of NOW made telephone calls to members of several national organizations asking if any might be in a position to adopt and publicize a boycott resolution aimed at the state of Nevada in an effort to influence the upcoming vote on the ERA in the Nevada legislature. She discovered that it was difficult to secure immediate decisions due to the requirements of the formal decision-making processes in each group. As a result, before the Nevada legislature voted on the ERA, there was little activity of substance undertaken by NOW that was directed at a convention boycott of Nevada or other unratified states. The evidence shows that NOW officials were then of the impression that the convention boycott was an original idea and were unawere that some organizations had adopted boycott resolutions as much as one and one-half years earlier.

NOW adopted its own convention boycott resolution in February, 1977. At that February meeting, NOW de-

cided to pursue a centralized convention boycott strategy. A committee was appointed to implement the new national strategy, but there is no evidence that much, if anything, was done in that regard during the first six months of 1977. NOW officers did complete studies of the legislative and political situation in each of the fifteen unratified states. Many organizations adopted convention boycott resolutions during the first half of 1977, but there is little evidence that NOW was actively soliciting such actions or coordinating a centralized convention boycott campaign during that period.

Dr. Frances Kolb was appointed to chair NOW'S reconstituted Economic Sanctions Committee in July, 1977, after which NOW's role in furthering the convention boycott movement increased significantly. A paid staff person was retained by NOW in August, 1977, to work on the boycott campaign, among other things. Although there is evidence that much of the time of the individuals in question was expanded to prepare for NOW'S role in the International Women's Year meeting in Houston in November, 1977, NOW's active role in the convention boycott campaign began that summer.

As the parties have stipulated, from that time until the trial of this case in October-November, 1978, NOW actively engaged in an "economic boycott campaign" that has been a significant part of and shared common goals with a larger convention boycott movement directed at unratified states. The stipulated goal of NOW's economic boycott campaign and the end of all of NOW's activities relevant to this action is the ratification of the Equal Rights Amendment.

There are many facets to NOW's campaign. NOW set up a committee on the national level to centrally coordinate the convention boycott movement. For at least some period of time, NOW retained a fulltime staff person to work on

the boycott campaign. NOW sent a letter urging the adoption of a convention boycott resolution to hundreds of organizations and arranged for follow-up telephone contacts. NOW arranged for the printing and distribution of a boycott brochure[3] which urges individuals to join the boycott campaign by working for a boycott resolution within their own organizations. This brochure incorporated a business reply card with which interested individuals could request further information on the boycott campaign. NOW also arranged for the manufacture of a campaign-style button identifying the wearer as a supporter of the convention boycott of unratified states.

NOW maintains an office in Washington, D.C., in which the mentioned boycott campaign work was done. The office served as a "clearinghouse" for information on the boycott. Individuals and groups were actively solicited to contact the NOW office for information and materials. For a period of time, NOW maintained a "Countdown House," utilizing a nationwide telephone campaign, in order to contact its local chapters concerning boycott activities and other projects. NOW officials and staff put together a "boycott kit" which was made available to individuals on request. In addition, this kit was set to NOW members across the country who were taking leadership roles in local NOW activities. The kit contained various materials for use by individuals desiring to promote the boycott.[4] NOW also prepared and distributed material

---

[3]There were two printings of 20,000 copies each. Several thousand brochures were distributed at the International Women's Year Conference in Houston, Texas, in November, 1977. The small fraction of NOW's 1977 budget ($5,000) earmarked for the economic boycott campaign went mainly for printing expenses.

[4]The kit contained the brochure and button described above, a list of the members of the national committee with their telephone numbers, a "guidelines for action" paper, a current list of organizations which had adopted a convention boycott resolution, a "position paper," a "boycott fact sheet," a list of convention changes, and a "contact sheet" listing the names and addresses of legislative leaders in unratified states. The boycott kit was not being distributed at time of trial because NOW officials found it to be prohibitively expensive.

suggesting that local governments be approached and urged to adopt boycott resolutions imposing limits on official travel to unratified states. This material contained tactical suggestions, including a sample resolution, whereby city and county legislators could be approached to solicit support for a boycott resolution. Materials provided to members of local NOW chapters also included tactical pointers for local boycott activities. Local chapters were urged to take an "inventory" of the organizational memberships of chapter members in order that local members could request boycott action of other organizations as members of those organizations and not as members of NOW.

Much of the boycott work carried on at NOW's Washington, D.C., office concerned NOW's effort to gather statistics on the boycott. NOW attempted to maintain an up-to-date list of organizations which had adopted a boycott resolution. It appears that maintenance of an accurate list was not a simple undertaking. The list required constant updating and checking for accuracy. Some of the information concerning boycott resolutions was provided to NOW as a result of NOW inquiries and general solicitation of information about the boycott; some was provided by groups or individuals on a completely voluntary basis. NOW took steps to ensure that the list of organizations was accurate. Procedures were adopted which required notification from an official of an organization and provided for subsequent telephone verification that an official action had been taken by a particular group. In addition to the list of organizations, NOW devised a statistical questionnaire which requested information on group size, convention attendance, and potential economic impact in terms of revenue loss due to a convention cancellation or site change.

NOW made a series of direct, personal contacts with many groups. Some of these personal contacts were part of

specific assignments to NOW officials. Some of the contacts were more general in nature, consisting of telephone calls, letters, speeches, and personal appearances of NOW officials or members. Some personal contacts were directed specifically to the adoption of a boycott resolution; some were generally directed at generating support for the ERA, without specific mention of the boycott. NOW also made a concerted effort to generate media interest in the ratification effort generally and the convention boycott specifically. NOW officers arranged for press conferences, provided press releases to media, submitted to interviews, and made many personal appearances. NOW also included stories on the boycott in its internal publication, the *National NOW Times,* urging participation in boycott projects by local members. The attainment of extensive press coverage for NOW's boycott efforts was a critical part of the economic boycott campaign.

There is evidence that several of NOW's local chapters and individual NOW members carried out boycott projects of their own, in particular, active efforts to secure adoption of boycott resolutions by local governments. Although there is ample evidence to support a finding that NOW actively encouraged and aided such projects with materials and information, the parties have stipulated that NOW has no control or supervision over its local chapters, and that the local chapters are independent and autonomous and do not act as agents of NOW.

Although NOW's economic boycott campaign is a significant part of a larger convention boycott movement, it does not occupy the field. ERAmerica, a coalition of many pro-ERA groups, was formed as a neutral umbrella-type organization to provide leadership and coordination to the ERA ratification effort. Represented on the board of directors of ERAmerica are groups such as the National

Education Association, the National Federation of Business and Professional Women, the National Womens' Political Caucus, the League of Women Voters, and the Coalition of Labor Union Women. ERAmerica has engaged in many of the same activities in support of the convention boycott as has NOW, including writing letters to organizations urging convention site changes away from unratified states, offering sample boycott resolutions, and keeping lists of organizations which have adopted such resolutions.[5] There is evidence that NOW and ERAmerica exchanged information on a staff level relating to corrections in their respective lists of boycotting organizations; however, there is nothing to indicate that the two groups made any effort to coordinate their activities in support of the convention boycott. ERAmerica recognized NOW's organizational role in the boycott movement, but has pursued an essentially independent, though somewhat parallel, course of action.

There is evidence of at least one completely independent effort in support of the boycott movement. Several professional historians conducted their own campaign to influence historical associations to which they belonged. This campaign involved letter writing and the organization of a petition drive among association members, all at the personal expense of the individuals. There is no evidence that this individual campaign was a result of solicitation by or a combination or agreement with NOW or anyone else.[6]

It is evident that even though NOW came to occupy what is perhaps the leadership role in the convention boy-

---

[5]On February 8, 1977, ERAmerica released a list of 15 national organizations which had adopted boycott resolutions, erroneously including the National Organization for Women. This list reflects activity in the convention boycott movement long before NOW took any part.

[6]On the contrary, the evidence shows that NOW did not even respond to correspondence from these individuals.

cott movement, it was and still is one factor among many The circumstances surrounding each convention cancellation in Missouri and the adoption of each convention boycott resolution are as varied as the number of organizations involved. Missouri alleges that these decision were made "at the express urging" and "in combination with" NOW. In fact, NOW's influence in the decisions varied greatly. As discussed above, there were several large groups which made boycott decisions far in advance of the inception of NOW's economic boycott campaign, and which could not have been influenced in any way by NOW. On the other hand, there are groups which were the objects of direct and active solicitation by NOW, including letters, personal contacts, speeches, and telephone calls. In these situations, active solicitation by NOW was followed by a boycott decision.[7]

There are other cases in which NOW's contacts with particular groups were of varying degree. Some groups adopting boycott resolutions were the recipients of a single letter as a part of a NOW mass mailing. Some groups were actively solicited by local NOW chapters, but had no contact whatever with NOW. Some groups were not contacted at all, but were influenced indirectly by NOW through the publicity surrounding the boycott movement and NOW's campaign.[8] Resolutions adopted by some groups expressly refer to NOW or the "NOW boycott." It is clear that some were influenced by the number and type of organizations which had previously adopted resolutions. This lends importance to the influence of NOW's list of boycotting organizations and its broad publication.

---

[7]Groups in this category include the American Nurses Association (in relation to the convention of the International Congress of Nursing), the National Council of Senior Citizens, and the American Home Economics Association. However, there was evidence that many groups in this category were considering some sort of participation in the convention boycott movement before the initial contact from NOW.

[8]The convention boycott movement was the subject of a front page article in the *New York Times* on November 13, 1977.

[1] The parties have stipulated that the goal of NOW's convention boycott campaign is the ratification of the ERA. A careful review of the entire record in this case confirms that no contrary finding is possible. The motivation of NOW and of the organizations involved in the boycott movement can be viewed from two points, both aimed directly at the legislative process. One reflects a desire of these groups to make a symbolic gesture. The evidence shows that the various decisions to encourage and to participate in the boycott were intended as demonstrations of support for ERA ratification. The affirmative step of a boycott resolution or convention cancellation, urged by NOW and taken by many organizations including NOW, was conceived to show strong support for a political issue, support of a nature beyond a simple expression of policy or preference. The other view of the intent behind the boycott movement concerns publicity. The public acts of these organizations were meant to attract attention and bring public visibility to the issue of ratification. This publicity was intended to engender discussion and lend an air of importance to the issue and to bring the question to a higher position among legislators' priorities. NOW and the other groups also intended that the adverse economic impact of the boycott on those who would otherwise profit from conventions in Missouri would cause those persons to influence their legislators to support ERA ratification. The record is convincing that the above-described actions were not intended as punitive, in the sense that the boycott was not intended to punish Missouri for its past failure to ratify but to promote ratification in the future, and were not motivated by any type of anticompetitive purpose.

NOW argues that the evidence is not sufficient to sustain a finding of combination or conspiracy within the meaning of § 1 of the Sherman Act. Assuming, *arguendo,* that the above-described actions taken by NOW fall within the

purview of the Sherman Act, there is sufficient evidence to justify a finding that NOW entered into a combination to implement a convention boycott of unratified states. It is clear that at least some of the decisions to boycott convention facilities of unratified states were taken in direct response to NOW's advocacy. In addition, the invitation to act, the presence of a strong motive for concerted action, and the knowledge that others were taking similar action are sufficient to find conspiracy under the Sherman Act. *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939).[9]

II. *Standing*[10]

The State of Missouri asserts that it has standing to bring this action for injunctive relief as "*parens patriae,* trustee, guardian and representative of its citizens and the economy of the State."[11]

The Supreme Court has settled that a state does have standing to sue under the antitrust laws to protect its quasi-sovereign interest in the well-being of its general economy and the welfare of its citizens. *Georgia* v. *Pennsylvania R. R.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945). This question of standing was reviewed in *Hawaii* v. *Standard Oil,* 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), in which the Court held that Hawaii, as *parens patriae,* could not recover damages for an injury to its economy under § 4 of the Clayton Act, 15 U.S.C. § 15.

---

[9]It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.

Interstate Circuit, Inc. v. *United States, supra,* at 226, 59 S.Ct. at 474.

[10]Because this substantial legal issue, raised in NOW's motion for summary judgment, was interposed so close to time of trial, this Court deferred its ruling until after the trial on the merits.

[11]It is unnecessary to reach other grounds for standing asserted by Missouri.

However, state standing to obtain injunctive relief to remedy an injury to its economy was effectually reaffirmed when the Court distinguished as "notably different" § 4, which requires injury to "business or property" in order to recover damages, and § 16 of the Clayton Act, 15 U.S.C. § 26, which authorizes injunctive relief upon a showing of "threatened loss or damage."[12] Missouri brings this action under § 16.

At the pleading stage of this case, Missouri alleged substantial injury to the "economy and prosperity" of the state, which included financial loss suffered by convention and tourist-related businesses and diminished tax revenues for the state and local governments as a result of the lower level of economic activity within the state. The evidence revealed that more than ten major conventions definitely booked[13] into Missouri cities have been cancelled as a result of the boycott movement.[14] These cancellations represent a very approximate revenue loss of at least $8.6 million to Missouri hotels, restaurants and numerous other businesses catering to the convention trade. Although no revenue loss estimate was available, at least six smaller conventions, also definitely booked into Missouri hotels, have been moved to facilities in other states. A substantial amount of tentative convention business, perhaps exceeding the dollar volume of cancelled definite bookings, has also been moved to locations outside of Missouri.[15] It is difficult to produce

---

[12]In holding that damage to a state's general economy is not an injury to its "business and property" necessary for recovery of damages under § 4, the Court contrasted the potential of multiple recoveries inherent to a *parens patriae* damage claim with the unitary effect of an injunction.

[13]In the parlance of the convention industry, a definite booking is the confirmation, probably in writing, of the official decision of the organization to designate a certain city or particular facilities for its meeting.

[14]At least one of these cancellations, occurring in 1976, predated NOW's active role in the boycott campaign.

[15]A tentative booking is notification from the organization that it is interested in particular facilities and constitutes a request that the space be reserved on a tentative basis pending an official decision. At this stage, the organization may tentatively book several locations, with the result that every tentative booking does not become a definite booking.

accurate estimates of revenue loss due to these cancellations because some of the conventions were scheduled to occur two or more years in the future. Obviously, the sales personnel in the convention and visitors bureaus and the affected hotels are and will be making efforts to rebook the previously reserved space with other conventions. There is evidence that some amount of such rebooking has taken place, which would reduce any estimate of revenue loss by the volume of the substituted business. The revenue loss equation, however, must include the consideration that most national conventions are book from three to five years in advance, some as far as ten years in advance. It is difficult, therefore, to rebook a large block of space with another large convention, if given only one or two year's notice from the time of cancellation.

The lead time requirement for most national conventions adds an additional factor to the estimation of injury. Although Missouri businesses catering to conventions have already been harmed in some degree due to cancellations of definite convention bookings, the evidence shows that the impact of the convention boycott may be felt to a greater extent some years in the future. Decisions being made currently concern site selection for conventions to be held five or ten years in the future. At least the larger organizations have a limited time frame in which advance bookings can be made and once that time is past, the potential business is lost because an alternative cite will have been selected. There may be no additional cancellations of definite bookings, but the refusal of the large number of boycotting groups to even *consider* a Missouri convention site poses an undeniable threat of injury in the future.

The estimate of revenue loss due to the convention boycott published by NOW in January, 1978, listed revenue loss to St. Louis of $11 million and revenue loss to Kansas

City of $8 million.[16] The NOW list of boycotting organizations dated October 17, 1978, contains 273 organizations and independent decision-making components thereof and 34 city and county governments.

NOW argues that Missouri lacks standing as *parens patriae* because the state seeks to represent the interests of a single industry, which is quite small in relation to Missouri's total economy,[17] and which is capable of action in its own behalf to protect individual interests.[18] NOW categorizes this case as one in which the interests of particular individuals are paramount, rather than one in which the interests of all the citizens of the State of Missouri are adversely affected, citing *Land O'Lakes Creameries, Inc.* v. *Louisiana State Board of Health*, 160 F.Supp. 387 (E.D.La. 1958). In that case, several Minnesota manufacturers of dried milk sued to overturn Louisiana milk labeling provisions. The Attorney General of Minnesota described the dairy industry as one which involves "a major economic activity of importance to the people of Minnesota" and sought leave to intervene as *parens patriae* on behalf of all Minnesota dried milk producers not already party to the suit. The court denied the state's motion to intervene, taking judicial notice that the dairy industry was neither the only nor the largest industry in Minnesota.

> The dairy industry statistics offered by Minnesota fail to demonstrate that the sale of dried milk is of

---

[16]NOW's estimate represents revenue loss over the period 1978-1981 and does not include revenue loss resulting from the cancellation of the 1981 International Congress of Nursing convention in Kansas City, Missouri. That convention is estimated to represent $3.2 million revenue to the convention site.

[17]It is NOW's position that whatever injury has been proved is insignificant if compared with the dollar volume of all economic activity within the state of Missouri. In 1977, the convention industry brought $183 million in revenue to the state. Total personal income in Missouri in 1977 was in the neighborhood of $25 billion.

[18]*See Action Committee for Tourism, Inc.* v. *National Organization for Women, Inc.*, Civil Action No. 78-1510 (E.D.La., filed May 6, 1978) (suit with issues common to this case brought by private interests).

> such pervasive importance to that industry and to Minnesota citizens generally that restrictions on the interstate distribution of dried milk would directly and materially affect the "welfare of the people of Minnesota." Thus the interests of the single industry here involved must be held to be private interests, not interests affecting the whole economy or all of the people of the state. This type of interest is insufficient to give Minnesota the right to sue as *parens patriae* in behalf of all, or a substantial number of her citizens. *Id.* at 389.

It is NOW's argument that the facts before this Court are analogous to those in *Land O'Lakes Creameries;* that Missouri's suit is for the benefit of individual interests rather than for the benefit of all the people of the state and that therefore the state lacks standing as *parens patriae.*[19]

Over NOW's strong relevancy objection, Missouri offered the testimony of an expert economist to illustrate (1) that the injury resulting from the boycott is not confined to a narrowly defined convention industry, but cuts across the entire economy of the state, and (2) that the magnitude of the injury to the general economy is much greater than the figures contained in the estimates of revenue loss to convention businesses. The economy of a political region, such as the State of Missouri, has been divided by economists into various sectors for the purpose of analysis.[20] The economic units (businesses and individuals) that make up each sector produce output which is exchanged with other sectors to obtain necessary inputs. These economic linkages between and among the various sectors are a primary cause of the interdependence which characterizes

---

[19] *See Oklahoma* v. *Atchison, T. & S. F. Ry.*, 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465 (1911). *Kansas* v. *United States*, 204 U.S. 331, 27 S.Ct. 388, 51 L.Ed. 510 (1907).

[20] *E.g.*, livestock, textiles and apparel, primary metals, household appliances, heavy construction contractors, etc. There are over 50 such sectors.

the complex state of a modern economy. There is evidence that the dollars spent by the average convention delegate flow fairly directly into thirteen sectors of the economy of the convention site.[21] However, the linkages between the sectors receiving convention dollars and other sectors operate to move that money through all the sectors, with the result that dollars spent by convention delegates affect *every* sector in the economy of the convention site. As convention dollars move through the economy, each turnover between sectors generates new dollars of business income in a phenomenon known as the "multiplier effect." Ecoomists have calculated multiplier figures that measure the flow of dollars into the economy and the successive turnover of those dollars into new business income until the identifiable dollars finally disappear. Using multiplier figures for the Missouri economy, it has been calculated that every dollar spent by people attending conventions in Missouri generates $2.78 in spending throughout the economy of the State of Missouri.

Missouri thus argues that, as convention spending affects all sectors of the economy, the withdrawal of convention dollars from Missouri has an adverse effect on *all* sectors of Missouri's economy. Missouri also urges consideration of the economic *effect* of the withdrawal of convention dollars, after application of the multiplier figure. Missouri maintains that the thus broadened base of incidence of injury (every economic sector affected) coupled with a consideration of the magnitude of its economic *effect* (post-multiplier) is sufficient to constitute an injury to the "general economy" of the state. The state, says Missouri,

---

[21]Sectors receiving convention dollars are hotels, eating and drinking places, meat processing, dairy products, grain mill products, other food products, gasoline service stations, other retail businesses, miscellaneous manufacturing, transportation services, other services, wholesale businesses, and imports. International Association of Convention and Visitors Bureaus, *Convention Delegate Expenditure Survey* 1973 (sector classifications were modified to comport with the analytical model of Missouri's expert witness).

should have standing as *parens patriae* to remedy such injury.

[2] The question thus presented to this Court is whether an economic injury of the type and extent as has been proved by the State of Missouri is sufficient to confer upon it standing as *parens patriae*. It is a question not likely to produce an easy answer. The District of Columbia Circuit considered the problem in *Pennsylvania* v. *Kleppe*, 174 U.S.App.D.C. 441, 447-48, 533 F.2d 668, 674-75, *cert. denied sub nom. Pennsylvania* v. *Kobelinski*, 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 584 (1976).

> The nature of the economic or welfare interest necessary to justify state standing is one of the more obscure issues with which we must deal. The valid though largely unhelpful generality which guides us is that the controversy must in substance implicate the state's interest in economic supervision, and not merely affect the fortunes of a limited class of her citizens. However, in view of the substantial interrelationship of all economic activity, no clear demarcation is possible between individualized harms and injury to the economy as a whole. This appears to be one area where the sufficiency of the injury actually alleged is highly contingent upon other relevant factors bearing on the appropriateness of letting the plaintiff state pursue the case on the merits.
>
> At one extreme, it is entirely clear that a state never has standing on the basis of personal claims asigned to it by individuals. It also seems well established that there can be no standing in the state where the primary thrust of an alleged wrong is injury to a narrowly limited class of individuals, and the harm to the economy as a whole is insignificant by comparison. However, in some cases, it has been held suf-

ficient that the direct impact of the alleged wrong be felt by a substantial majority, though less than all, of the state's citizens, so that the suit be said to be for the benefit of the public. And even where the most direct injury is to a fairly narrow class of persons, there is precedent for finding state standing on the basis of substantial generalized economic effects.

It thus appears that injury to the state's economy or the health and welfare of its citizens, if sufficiently severe and generalized, can give rise to a quais-sovereign interest in relief as will justify a representative action by the state. *The cases indicate not only that the nature and degree of essential harm cannot be characterized with any precision, but that factors other than the degree of injury are influential in determining state standing. . . .* [I]t *also appears that the sufficiency of the state interest asserted may sometimes be influenced by policy concerns arising from the context of the suit quite apart from the injury itself.* (emphasis added)

This Court is convinced that *parens* standing is not foreclosed simply because the most direct injury is suffered by a rather narrow class of individuals. NOW argues that the businesses that have been injured are capable of bringing suit to protect their individual interests and thus there is no justification for intervention by the state as *parens patriae,* citing *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry.,* 220 U.S. 277, 31 S.Ct. 434, 55 L.Ed. 465 (1911). In *Burch* v. *Goodyear Tire Co.,* 420 F.Supp. 82 (D.Md. 1976), *aff'd,* 544 F.2d 633 (4th Cir. 1977), the Attorney General of Maryland brought suit for injunctive relief under § 16 of the Clayton Act. It was alleged that Goodyear and Cities Service Oil Company had combined to restrain competition among tire manufacturers and fore-

close competition in the tire replacement market, which consisted of individual Cities Service service station dealers. Goodyear argued that the suit was for the benefit of the individual service station dealers and that therefore the state lacked standing as *parens*. The district court, later affirmed by the Fourth Circuit, rejected that argument and distinguished *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry., supra,* as it involved a direct monetary benefits to the "individual" being represented by the state. The district court in *Burch* noted that there was no claim by Goodyear that the individual service station dealers would receive any monetary gain as a result of the suit and held that the state did have standing to sue.

> Any suit by a state on behalf of its citizens as a whole will benefit some of its citizens more than others. . . . The premise of the antitrust laws is that an anticompetitive injury felt acutely by a few is also an injury to the commonweal. The fact that some will benefit more than others is not a barrier to maintenance of this lawsuit. *Burch* v. *Goodyear Tire & Rubber Co., supra,* at 89.

The facts in *Burch* are analogous to this case inasmuch as there is no claim by NOW that any of the businesses that make up the convention industry in Missouri will receive any monetary benefit as a result of this lawsuit.

[3] As a part of the reasoning process to determine whether a state will be recognized to have standing as *parens patriae,* courts have had the occasion to consider factors involved. In *Pennsylvania* v. *Kleppe,* quoted *supra,* the court referred to and considered "policy concerns arising from the context of the suit quite apart from the injury itself." NOW cites *Land O'Lakes Creameries,* in which the court found the interests involved to be private and denied state standing as *parens patriae.* However, removed from

its analysis of the *type of injury* alleged, the district court in that case noted that it considered "the advisability of allowing the Attorney General of Minnesota to range at large in courts of other states, and of the United States, seeking to have declared unconstitutional laws passed by the legislatures of those states." *Id.* at 390. Indeed, the issue of *parens patriae* standing has been most often litigated in the context of an assertion of the original and nonexclusive jurisdiction of the Supreme Court. It is undeniable that such cases "do not present an isolated question" and may "involve the concern to shepard the scarce time and resources of that tribunal." *Pennsylvania* v. *Kleppe, supra,* 174 U.S.App.D.C. at 447 n.36, 533 F.2d, at 674 n.36. *See, e. g., Pennsylvania* v. *New Jersey,* 426 U.S. 660, 665, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976). This court has found that the businesses of Missouri's convention industry have suffered economic injury as a result of the boycott and are threatened with additional injury in the future. Although the dollar volume of that injury is a small relative proportion of the entire Missouri economy, the injury is not insubstantial in the absolute. The adverse effect of the injury extends to all parts of the economy of the state. After having considered the nature and the extent of the injury to the economy of Missouri, this Court is compelled to turn to the additional factors and policy concerns mentioned in *Pennsylvania* v. *Kleppe* and *Land O'Lakes Creameries, supra.*

It has been remarked that this case has no precedent; that it presents a unique set of circumstances not before determined in any other court. The fact weighs as heavily in that balance on the issue of standing as it does on the merits. The parties stipulate that the aim of the boycott is to secure ratification of the Equal Rights Amendment. All of the boycott activity undertaken by NOW insofar as it has affected the State of Missouri, has been directed toward

securing an act of the Missouri General Assembly. NOW's target, if such a word can be used, is the state legislature, the supreme policy-making body of the state. The State of Missouri as a political entity is as much a part of the underlying controversy as is Missouri a formal party to the lawsuit. In this unique set of circumstances, after giving full consideration to the type and extent of general economic injury suffered, this Court is drawn to the conclusion that it is appropriate that the State of Missouri have standing as *parens patriae* to pursue this matter on the merits and seek injunctive relief under the antitrust laws. The Court is of the opinion that this is not a case "in which the state is gratuitously attempting to prosecute purely personal claims of its citizens, . . . but rather is one in which the state is seeking to protect the public interest." *Kelley* v. *Carr,* 442 F.Supp. 346, 357 (W.D.) Mich. 1977).

[4] It must be noted that this conclusion is the result of a consideration of the economic and policy factors in this case. This opinion is not to be read as a general approval of *parens patriae* standing as a matter of law in any case in which the state adduces expert testimony to show generalized economic injury due to linkage or interdependence among the various sectors of the state's economy.[22]

III. *Antitrust Claims*

"Boycott" has been defined as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from

---

[22]NOW argues that "[a]cceptance of the state's theory [of economic linkage causing damage to the general economy] would give the state standing to sue in every case where any Missouri business claims injury by reason of any tort, including violations of antitrust laws, or presumably even in ordinary breach of contract cases." Defendant's post-trial brief, at 10. The Court shares this concern and notes that the economic interdependence rationale for *parens patriae* standing cannot be viewed in isolation or accepted as the sole justification for state standing. To do so would carry the doctrine of *parens patriae* far beyond its proper bounds.

the target." *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 541, 98 S.Ct. 2923, 2930, 57 L.Ed.2d 932 (1978). From the very beginning of antitrust enforcement, the boycott or concerted refusal to deal has been held to be a combination in restraint of trade, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. *E. g., Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600, 34, S.Ct. 951, 58 L.Ed. 1490 (1914). Missouri contends that the convention boycott fostered by NOW is a combination in restraint of trade and as such violates the Sherman Act.[23]

It is NOW's position that the antitrust laws simply do not apply to the convention boycott because of its "non-commercial" nature.[24] "[T]he Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra*, 359 U.S. at 213 n.7, 79 S.Ct. at 710 n.7. NOW argues that the convention boycott takes place in a political, rather than business, context and thus is outside the scope of the Sherman Act,[25]

---

[23]Missouri further argues that withholding patronage from Missouri convention businesses in order to influence the Missouri legislature constitutes a secondary boycott, *i.e.*, economic pressure on innocent third parties to achieve some result with respect to the boycott target, and therefore is *per se* unlawful under the Sherman Act. *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra; Fashion Originators' Guild* v. *F.T.C., supra.*

[24]*See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.5, 60 S.Ct. 982, 84 L.Ed. 1311 (1940) (Sherman Act intended to control problems of "business competition").

[25]Missouri cites cases for the proposition that the Sherman Act does apply to "non-traditional" boycotts, the ultimate focus of which is an objective other than the business or commercial advancement of the participants. *American Medical Assoc.* v. *United States*, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943) (exclusion from hospital facilities of doctors on salary with prepaid group health plan); *Hennessey* v. *National Collegiate Athletic*

(Continued on next page)

which was intended to concern "commercial enterprises, competing in particular markets, arguing over issues which will determine the commercial success and profitability of one or the older of the parties to the dispute." *Council for Employment and Economic Energy Use* v. *WHDH Corp.*, 580 F.2d 9, 12 (1st Cir.), *petition for cert. filed*, 47 U.S.L.W. 3228 (U.S. Sept. 21, 1978) (No. 78—486).

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Supreme Court considered the scope of the Sherman Act in a political context. In that case, the railroads conducted a publicity campaign designed to promote stricter government regulation of the trucking industry. The campaign, utilizing methods characterized as unethical, was motivated by a purely anticompetitive purpose. Citing *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 317 U.S. 341 (1943), the Court reiterated that a restraint of trade resulting from a valid government action could not be the basis of a Sherman Act violation and stated.

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a

---

Footnote continued

Assoc., 564 F.2d 1136 (5th Cir. 1977) (application of Sherman Act to regulation of non-profit educational association limiting the number of assistant football coaches of member institutions); *Council of Defense* v. *International Magazine Co.*, 267 F. 390 (8th Cir. 1920) (boycott of Hearst publications organized by officially-supported state organization); *Tondas* v. *Amateur Hockey Assoc.*, 438 F.Supp. 310 (W.D.N.Y. 1977) (non-profit athletic association); *Tropical Film Corp.* v. *Paramount Pictures Corp.*, 319 F.Supp. 1247 (S.D.N.Y.1970) (film rating program); *American Brands, Inc.* v. *National Assoc. of Broadcasters*, 308 F.Supp. 1166 (D.D.C.1969) (guidelines prohibiting advertising of "low tar" cigarettes). *But cf. Marjorie Webster Junior College, Inc.* v. *Middle States Assoc. of Colleges and Secondary Schools, Inc.*, 139 U.S.App.D.C. 217, 432 F.2d 650, *cert. denied*, 400 U.S. 965, 91 S.Ct. 367, 27 L.Ed.2d 384 1970).

process of expansive construction, be brought within the general proscription of "combination[s] . . . in restraint of trade," they bear little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. *To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely*

> *inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions.* The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. *Id.*, 365 U.S. at 136-38, 81 S.Ct. at 529-530. (emphasis added)

The Court found that the anticompetitive purpose underlying the railroads' campaign was irrelevant, in that the right of the people to inform their representatives could not depend upon their intent in so acting. The unethical and misleading methods employed by the railroads also were found not to be a basis for Sherman Act liability.

> Insofar as the Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to

> problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical. *Id.* at 140-41, 81 S.Ct. at 531.

Missouri's analysis would limit the Court's holding in *Noerr* to its facts and distinguish that case from this. The convention boycott fostered by NOW, it is argued, is the very antithesis of the activity protected in *Noerr*. The Court in *Noerr* found that concerted activity to influence the legislature to adopt a law which would result in a restraint of trade was not a Sherman Act violation. The restraint of trade in *Noerr* was the result of a valid legislative act, already held nonviolative of the Sherman Act in *Parker* v. *Brown, supra.* On the contrary, says Missouri, the restraint of trade in this case is a direct result of the concerted action undertaken by NOW and the boycott participants; the harm results from the combination, and not from the legislative act which is the boycott's ultimate goal. Missouri states that NOW's actions have gone far beyond the "mere solicitation of government action" in *Noerr, supra,* and are therefore not within the *Noerr* "exclusion" from antitrust coverage.

Missouri's conclusion of antitrust liability is based on the presumption against implied exclusions from the Sherman Act. In *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Court referred to the "over-arching and fundamental" policies represented in the antitrust laws which argue against implied exclusions. The Court noted that two policies have been held sufficiently weighty to overcome this presumption: the *Parker* v. *Brown* "state action"

exclusion, and the *Noerr* "political" exclusion, concerted action to influence lawmakers. The Court found common to both of these exclusions a potential conflict between the Sherman Act and " 'polic[ies] of signal importance in our national traditions and governmental structure of federalism.' " However, the Court did remark that even these exclusions would not prevent antitrust enforcement unless it was thought to "severely impinge" upon the fundamental policies underlying the exclusions.

Missouri argues specifically against a general "first amendment exclusion" from Sherman Act coverage. In *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949), the Supreme Court held that the first amendment does not protect speech or writing used as an integral part of conduct in violation of a valid criminal statute. Missouri cites cases applying this principle to Sherman Act enforcement. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Associated Press* v. *United States*, 326 U.S., 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). These cases hold that conduct found to be in violation of the Sherman Act is not immunized from antitrust liability simply because it involves some element of speech. "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' . . . ." *California Motor Transport Co.* v. *Trucking Unlimited*, *supra*, 404 U.S. at 515, 92 S.Ct. at 614. However, they do not touch the issue in this case, which is whether NOW's actions, which are themselves an exercise of first amendment rights, constitute a violation of the Sherman Act.[26]

---

[26]*Council of Defense* v. *International Magazine Co.*, 267 F. 390 (8th Cir. 1920), cited by Missouri, is not to the contrary. The Eighth Circuit found that a boycott of Hearst magazines organized by a state-supported organization was a violation of the Sherman Act. The court stated: "Any contention

(Continued on next page)

The activities of the railroads complained of in *Noerr, supra,* were undertaken in what was essentially a commercial context. The parties and the industries they represented were in a competive relationship. It was clear that the sole motivation behind the railroads' actions was to destroy that competition. Although such a commercial setting is the context in which the antitrust laws were intended to operate, the Supreme Court found that the railroads' publicity campaign was not subject to the Sherman Act, as a contrary construction would hinder the communication vital to a representative government and raise important constitutional questions implicating the first amendment.

[5] In contrast, the convention boycott complained of in this case takes place in what is essentially a political context. The parties have stipulated that the sole purpose of the boycott is ratification of an amendment of the Constitution. The participants are not moved by any anti-competitive purpose;[27] they are not in a competitive relationship. The boycott can be characterized as "non-commercial," in that its participants are not business interests and its purpose is not increased profits.[28] The boycott also can be termed "noneconomic"; it was not undertaken to advance the economic self-interest of the participants. The "essential dissimilarity" between the

---

Footnote continued

that appellants were within their constitutional rights of free speech in saying, writing, and publishing the objectionable matter, is answered by *Gompers* v. *Buck Stove Co., supra.*" In *Gompers* v. *Buck Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911), the first amendment question raised was identical to that in *Giboney* v. *Empire Storage & Ice Co., supra,* in which the Court held that an otherwise illegal action is not protected simply because speech is used to advance the illegal activity. The first amendment protections for freedom of petition and of political association, which are implicit in this case, were neither presented to nor treated by the court in *Council of Defense.*

[27] *See Miller & Son Paving, Inc.* v. *Wrightstown Township Civic Assoc.*, 443 F.Supp. 1268, 1272 (E.D.Pa.1978).

[28] *See* Coons, *Non-commercial Purpose as a Sherman Act Defense*, 56 Nw.L.Rev. 705 (1962); Bird, *Sherman Act Limitations on Non-commercial Concerted Refusals to Deal*, 1970 Duke L.J. 247.

convention boycott directed at the legislatures of unratified states and agreements traditionally held violative of § 1 of the Sherman Act is of a greater magnitude in this case than that in *Noerr*.

Application of the Sherman Act to NOW's boycott campaign also would involve serious questions concerning the right of petition and the freedom of association protected by the first amendment.[29] In *Noerr* the Supreme Court "recognized a necessary limitation in order to resolve the conflict between the legislative intent to foster competition and the fundamental precepts embodied in the First Amendment which protect legitimate attempts to influence the operation of the executive and legislative process." *Bethlehem Plaza* v. *Campbell*, 403 F.Supp. 966, 969 (E.D.Pa. 1975).[30] The Supreme Court's reasons for nonapplication of the antitrust laws in *Noerr* apply with greater weight to this case, which "involves political opponents, not commercial competitors; and political objectives, not market place goals.[31] For these reasons, this Court concludes that the Sherman Act does not apply to the actions of NOW in furtherance of its convention boycott campaign.[32] "There are areas of our economic and

---

[29]*See J. P. Stevens & Co., Inc.* v. *Jackson*, 99 L.R.R.M. 2827 (N.D.Ga. 1978). *See also Shelton* v. *Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *NAACP* v. *Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). *Cf. NAACP* v. *Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (Of the NAACP, the Supreme Court said: "For such a group, association for litigation may be the most effective form of political association." *Id.* at 431, 83 S.Ct. at 337).

[30]*See also Mountain Grove Cemetery Assoc.* v. *Norwalk Vault Co.*, 428 F.Supp. 951 (D.Conn.1977).

[31]*Council for Employment and Economic Energy Use* v. *WHDH Corp.*, 580 F.2d 9, 12 (1st Cir.), *petition for cert. filed*, 47 U.S.L.W. 3228 (U.S. Sept. 21, 1978) (No. 78-486).

[32]This Court has considered and dismissed the theory advanced in Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 Duke L.J. 247, in which the author urges that noncommercial boycotts be treated as *per se* unlawful under the antitrust laws. The noncommercial boycott is seen as an "undesirable aggregation of private [economic] power" with no more than self-imposed restraints on harm caused to others. The author hypothesizes that such power could be wielded by zealous believers willing to impose economic harm upon their victims

(Continued on next page)

political life in which the precepts of antitrust must yield to other social values.'"[33] It is clear that this is such a case.[34] Likewise, the Missouri antitrust law, § 416.031.1, RSMo, does not apply to NOW's activities in furtherance of the boycott campaign.[35]

IV. *State Law Tort Claim*

[6, 7] Missouri alleges that NOW has intentionally inflicted economic harm upon the state without legal justification or excuse, and offers as authority § 766 of the *Restatement of Torts* (1939).[36] That section provides that the unprivileged inducement of third parties not to engage in business relations with another is tortious. Missouri courts have stated that the unjustified interference with reasonable expectancies of commercial relations in an actionable tort, citing § 766 of the *Restatement*. *Downey* v. *United Weatherproofing, Inc.*, 363 Mo. 852, 253 S.W.2d 976 (Mo. 1953). The absence of justification, or existence of privilege, is an essential and required element of any such claim. *Cady* v. *Hartford Accident & Indemnity Co.*,

---

Footnote continued

without limit until their noneconomic goal is achieved. This theory does not confront the first amendment guarantees of freedom of association and the right to petition which must be dealt with by the courts. This lack, coupled with the political realities of American government, makes it impossible for this Court to subscribe to it.

[33]Handler, *Annual Review of Antitrust Developments*, 71 Yale L.J. 75, 88 (1961).

[34]*See Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978); *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 375 F.Supp. 350 (N.D.Ill.1974), *aff'd*, 516 F.2d 220 (7th Cir. 1975); Kestenbaum, *The Antitrust Challenge to the Arab Boycott*, 54 Tex.L.Rev. 1411, 1423-24 (1976).

[35]Section 416.141, RSMo, provides: "Sections 416.011 to 416.161 shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes."

[36]Restatement of Torts § 766 provides:

Except as stated in Section 698, [dealing with interference with a marriage contract] one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or

(b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

Missouri cites no cases from its own courts on this issue.

439 S.W.2d 483 (Mo. 1969).[37] In this case economic pressure is being utilized in a good faith effort to influence the ratification of an amendment to the Constitution. In these circumstances, the interest sought to be advanced by NOW and especially the constitutional interests involved in protecting NOW's ability to exercise its right to petition and right to political association outweigh the interest in protecting the business expectancy involved.[38] If NOW's actions were not a legitimate effort to influence the legislature, this Court would be presented with a different case.[39] Under the particular facts of this case, the Court finds that NOW's convention boycott activities are privileged and therefore not actionable in tort under Missouri law.

Accordingly, the relief prayed for by the State of Missouri should be, and it is hereby, denied. In accordance with this opinion, judgment is to be entered for defendant.

IT IS SO ORDERED.

ELMO B. HUNTER
JUDGE

---

[37]Factors applicable to the determination of justification or privilege are set out in Restatement of Torts § 767 (1939):
In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:
(a) the nature of the actor's conduct,
(b) the nature of the expectancy with which his conduct interferes,
(c) the relations between the parties,
(d) the interest sought to be advanced by the actor, and
(e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.
The discussion of privilege in the Restatement, including §§ 767 and 768, is referred to in *Downey* v. *United Weatherproofing, supra.*

[38]*See Sierra Club* v. *Butz*, 349 F.Supp. 934 (N.D.Cal. 1972) (recognition of privilege based on first amendment right of petition).

[39]*See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ("sham" exception). *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

APPENDIX C

(United States Constitutional Provisions Involved)

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redess of grievances.

Article IV, Section 4, of the United States Constitution:

> The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence.

APPENDIX D

(United States Statutory Provisions Involved)

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (As amended December 21, 1974, and December 12, 1975.)

Section 16 of the Clayton Act, 15 U.S.C. § 26 (as amended September 30, 1976):

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss

PREVIOUS PAGE WAS BLANK

or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

APPENDIX E

(Missouri Statutory Provisions Involved)

Section 416.031.1, RSMo 1978 (The Missouri Antitrust Law):

> **416.031. Restraint of trade prohibited.**—1. Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.

Section 416.061.1-3, RSMo 1978 (The Missouri Antitrust Law):

> **416.061. Attorney general to prevent and restrain violations—consent judgments authorized.**—1. The several circuit courts of this state are invested with jurisdiction to prevent and restrain violations of section 416.031.
>
> 2. It shall be the duty of the attorney general to enforce the provisions of sections 416.011 to 416.161. It shall be the duty of the attorney general to institute civil proceedings to prevent and restrain violations of sections 416.011 to 416.161. The attorney general may employ special counsel in suits to enforce the provisions of sections 416.011 to 416.161 or in actions on behalf of the state or in his representative capacity under subsection 3 of this section in the federal courts brought under federal statutes pertaining to antitrust, trade regulation, restraint of trade or price fixing activities. The attorney general, at his discretion, may direct the appropriate county prosecuting attorney of any county in which any proceeding is instituted or brought by the state under sections 416.011 to 416.161 or in which any investigation of a violation of sections 416.011 to 416.161 is occurring to aid and assist him in the conduct of such investigations and proceedings. All rea-

sonable and necessary expenses incurred by a county prosecuting attorney or his staff in assisting the attorney general shall be reimbursed from appropriations made to the attorney general.

3. The attorney general may represent, besides the state and any of its political subdivisions or public agencies, all other political subdivisions. School districts and municipalities within the state in suits to enforce the provisions of sections 416.011 to 416.161 or in actions brought in the federal courts under any federal statute pertaining to antitrust, trade regulation, restraint of trade or price fixing activities.

Section 416.141, RSMo 1978 (The Missouri Antitrust Law):

416.141. How construed as to comparable federal acts.—Sections 416.011 to 416.161 shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.